Supreme Court, U.S.
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No. 03-

IN THE
Supreme Court of the United States

SANTA BARBARA NEWS-PRESS, et al.,
Petitioners,

v.

LEONARD M. ROSS,
Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal, Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment requires appellate courts in a libel case to independently review a jury's finding that an allegedly defamatory statement was not substantially true.

2. Whether a person who has or seeks control over a business in a pervasively regulated industry is a "public figure" under the First Amendment for the limited purpose of media coverage about his business dealings.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared as defendants below and are petitioners here: The New York Times Company, Kathleen Sharp, and David McCumber.

RULE 29.6 STATEMENT

Petitioner Santa Barbara News-Press was a division of The New York Times Company at the time the news articles at issue were published and at the time this lawsuit was filed. Petitioner The New York Times Company has no parent corporation, and no publicly held company holds more than 10% of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 8

I. This Court Should Resolve The Conflict Over Whether An Appellate Court In A Libel Case Must Independently Review A Jury's Finding That an Allegedly Defamatory Statement Was Not Substantially True. 8

A. State And Federal Courts Are Divided On This Issue. 8

B. The California Court of Appeal's Refusal To Undertake Independent Review Here Contravenes This Court's Precedent. 12

C. Application Of The Proper Standard Of Review Is Critical In Cases, Like This One, Involving The Exercise Of Constitutional Rights 14

II. This Court Should Resolve Whether Individuals Who Own Or Control Businesses In Pervasively Regulated Industries Are "Public Figures" For The Limited Purpose Of Media Coverage Of Their Business Dealings. 17

A. There Is Substantial Disagreement In Lower Courts Concerning This Issue. 17

B. The Court Of Appeal's Refusal To Treat Respondent As A Limited Purpose Public Figure Contravenes This Court's Precedent.....21

C. It Is Vital That This Court Bring Order To The Limited Public Figure Doctrine Without Further Delay.....23

CONCLUSION 25

APPENDIX.....1a

Second Opinion of the California Court of Appeal.....1a

Superior Court's Order on Public Figure Issue.....51a

California Supreme Court's Second Denial of Discretionary Review.....55a

First Opinion of the California Court of Appeal.....56a

California Supreme Court's First Denial of Discretionary Review.....93a

Second Newspaper Article at Issue.....94a

First Newspaper Article at Issue.....97a

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American Benefit Life Insurance Co. v. McIntyre, 375 So. 2d 239 (Ala. 1979).....21
Antwerp Diamond Exchange v. Better Business Bureau, 637 P.2d 733 (Ariz. 1981).....19
Bank of Oregon v. Independent News, 693 P.2d 35 (Or. 1986).....20
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Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989).....20
Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) .... passim
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Cooper Industries v. Leatherman Tool Group, 532 U.S. 424 (2001).....14
Coronado Credit Union v. KOAT Television, Inc., 656 P.2d 896 (N.M. 1982).....21
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).....18
Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986).....12
Dickinson v. Zurko, 527 U.S. 150 (1999).....14
Edwards v. South Carolina, 372 U.S. 229 (1963).....13
Fram v. Yellow Cab Co., 380 F. Supp. 1314 (W.D. Pa. 1974).....20
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Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)..... passim
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Hathorn v. Lovorn, 457 U.S. 255 (1982).....19
Herbert v. Lando, 441 U.S. 153 (1979).....14

Hess v. Indiana, 414 U.S. 105 (1973) 13
Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995) 13
Hutchinson v. Proxmire, 443 U.S. 111 (1979) 18, 22
Jenkins v. Georgia, 418 U.S. 153 (1974) 13
Khawar v. Globe Internat, Inc., 965 P.2d 696 (1998) 4, 17
Koon v. United States, 518 U.S. 81 (1996) 14
Liberty Lobby, Inc. v. Dow Jones & Co., 38 F.2d 1287 (D.C. Cir. 1988) 12
Locricchio v. Evening News Ass'n, 76 N.W.2d 112 (Mich. 1991) 12, 15, 16
Lundell Mfrg. Co. v. American Broadcasting Cos., 98 F.3d 351 (8th Cir. 1996) 11, 15
Masson v. New Yorker Magazine, 501 U.S. 496 (1991) 14, 16
McCoy v. Hearst Corp., 727 P.2d 711 (Cal. 1986) 10
Miller v. California, 413 U.S. 15 (1973) 13
Morris v. Warner, 770 P.2d 359 (Ariz. App. 1989) 11
New York Times Co. v. Sullivan, 376 U.S. 264 (1964) 9, 24
Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990) 9
Ornelas v. United States, 517 U.S. 690 (1996) 14
Peeler v. Spartan Radiocasting, Inc., 478 S.E.2d 282 (S.C. 1997) 11
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 13, 14, 16
Reese v. Georgia, 350 U.S. 85 (1955) 19
Rouch v. Enquirer & News, 487 N.W.2d 205 (Mich. 1992) 15
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Sisler v. Gannett Co., 516 A.2d 1083 (N.J. 1986) 19
Skinner v. Railway Executives' Railway Ass'n, 489 U.S. 602 (1990) 22
Street v. New York, 394 U.S. 576 (1969) 13
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Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) 11, 15
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Statute:

28 U.S.C. § 1257(a).....1

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to the California Court of Appeal, Second Appellate District, in *Ross v. Santa Barbara News-Press,* No. B151127.

OPINIONS BELOW

The opinion of the California Court of Appeal at issue here (App. 1a-50a) is not officially published but is reported at 32 Media L. Rep. 1025 and 2003 WL 22220512 (Cal. App. 2003). The order of the California Supreme Court denying discretionary review of that decision (App. 55a) is unpublished. An earlier, relevant decision of the California Court of Appeal (App. 56a-92a) is not officially published but is reported at 25 Media L. Rep. 2089 (Cal. App. 1997). The Superior Court's relevant order (App. 51a-54a) is unpublished.

STATEMENT OF JURISDICTION

The California Supreme Court issued its order denying Petitioners' petition for review on January 14, 2004. App. 55a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment, which applies to the States through the Fourteenth Amendment, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

STATEMENT OF THE CASE

This libel case – which arises from two newspaper articles concerning a prominent business figure's efforts to increase his ownership interest in a region's largest savings and loan – presents two important First Amendment issues that

have generated great confusion and inconsistency among state and federal courts.

1. In the 1980's, in a precursor to the recent corporate accounting and mutual fund scandals, several bank collapses and related criminal investigations shook the savings-and-loan industry to its core. Millions of people lost billions of dollars. Federal and state governments commenced bailout efforts. As a result, the media stepped up its scrutiny of prominent individuals and businesses in the savings-and-loan industry. *See, e.g.,* Jeff Baily & G. Christian Hill, *Federal Fiasco: Banks and S&Ls Face New Wave of Failures as Regulators Goof Up,* Wall St. J., March 31, 1988, at A1; Robert Kuttner, *We Could Have Avoided a Cool $50 Billion for S&Ls by Staying With Regulation*, L.A. Times, Oct. 10, 1988 at IV5.

During this time, Santa Barbara Savings and Loan ("SBSL" or "the Bank") was the region's oldest and largest savings and loan, and was a key source of financial security for thousands of local residents. As detailed in numerous newspapers, the Bank also was beset by management and financial difficulties that included millions of dollars in losses. *See* Cyndi Mitchell, *Santa Barbara S&L May Sell Half Its Offices*, L.A. Times, July 27, 1984, at D10; *Net Loss of $9.8 Million Is Posted by Financial Corp. of Santa Barbara*, Wall St. J., Aug. 2, 1984, at A17; Tom Furlong, *Santa Barbara S&L Says Worst is Over*, L.A. Times, Jan. 15, 1985, at IV1; Kathleen Sharp, *S&L Reports 85% Drop in Profits*, Santa Barbara News-Press, Feb. 12, 1988, at A1.

In the late 1980's, Respondent Leonard Ross became the largest non-institutional shareholder in SBSL. Several news articles during 1987 and early 1988 reported on his steady purchase of stock in the Bank. Later in 1988, Respondent and his then-wife applied to the California Department of Savings and Loan (in a painstakingly detailed, 878-page application) for approval to increase their shares in

SBSL from 9.9 to 24.9 percent – a level of ownership significant enough to automatically trigger a statutory presumption of control over the institution. He also discussed plans at a SBSL shareholder meeting that was attended by some members of the media. *See* J. Patrick O'Hara, *Shareholder Lashes Expenses of S&L*, Santa Barbara News-Press, April 27, 1988, at A1.

After Petitioner Santa Barbara News-Press learned of Respondent's application and reported on his speech, it became interested in learning more about his background. It assigned one of its reporters, Petitioner Kathleen Sharp, to write a profile about Ross and his efforts to control SBSL. Sharp worked for three months gathering information concerning Respondent, during which time she conducted dozens of interviews and reviewed an FBI report, federal grand jury transcripts, and hundreds of pages of court documents. Sharp also interviewed Respondent himself.

Based on Sharp's research, the News-Press published two front-page articles in late 1988 and early 1989 describing Respondent's efforts to purchase a controlling interest in SBSL. *See* App. 93a-113a. In addition to discussing the current status of Respondent's bid for control of the Bank, the articles detailed several undisputed facts regarding Respondent's checkered business career. First, the News-Press reported that federal law enforcement authorities had investigated Respondent in the early 1970's for the alleged extortion, pistol-whipping, and kidnapping of his then-business partner, Barry Marlin. Second, the News-Press reported that federal authorities had investigated, indicted and imprisoned Marlin for investor fraud. Third, the articles noted that hundreds of investors had filed civil lawsuits against both Respondent and Marlin, accusing them of fraud. The articles expressly stated that Respondent denied any wrongdoing and that Respondent never was criminally charged or found liable in the civil fraud litigation.

After the first article was published, Respondent withdrew his application with the California Department of Savings and Loan. App. 7a.

2. In 1989, Respondent filed a defamation suit in the California Superior Court for Los Angeles County against the News-Press; its parent company, The New York Times Company; Sharp; and the News-Press' executive editor, David McCumber. Although Respondent eventually acknowledged that most of the articles' statements regarding his history of legal tribulations were true or otherwise non-actionable, he alleged that four specific statements regarding the details of the prior federal investigations were false. App. 63a. Respondent further claimed that the articles defamed him by implying in general that he "was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison." *Id.* Respondent sought millions of dollars in compensatory and punitive damages.

During pretrial proceedings, the trial court ruled that Respondent was a "private figure," rejecting the News-Press' contention that at the time the articles in question were published he was a public figure for the limited purpose of his business dealings. The trial court reasoned that a person cannot be a public figure without "thrust[ing] himself to the forefront of a particular public controversy" and that, at the time the articles were published, Respondent's attempts to increase his ownership interest in SBSL were not themselves controversial. App. 52a-53a. In light of this ruling, Respondent needed merely to prove that the defendants acted negligently, instead of with actual malice, to be eligible for compensatory damages. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Khawar v. Globe Internat, Inc.*, 965 P.2d 696, 708 (1998). Punitive damages, however, remained available only upon a showing of actual malice. *See Gertz*, 418 U.S. at 349.

Following a trial that resulted in a mixed jury verdict, the trial court ordered a new trial on the grounds that portions of the jury's special verdict form were inconsistent and that the emotional distress award was excessive. App. 64a.

3. The California Court of Appeal affirmed the trial court's public-figure ruling and its new trial order. App. 56a-87a. As to the former, the court stated that "neither [Respondent's] shareholder status, his professional status, nor his status as a prominent business person invited public attention" sufficient to render him a limited-purpose public figure. App. 76a. Rather, the court reasoned that even an influential businessman or a controlling shareholder of a regulated business must thrust himself into a public controversy in order to be a public figure to any extent, and it concluded that no such controversy was present here: "Even if there was a nationwide discussion involving the savings and loan industry" during the late 1980's, "[g]eneral concern over an item of interest" does not suffice "to convert the general subject of the banking industry into a public controversy." App. 75a-76a. The court acknowledged that public interest developed concerning "[Respondent's] involvement with [SBSL] and his desire to purchase an additional interest in the bank," but the court asserted that this interest "was created by the newspaper articles" instead of any voluntary action by Respondent. App. 75a.

The Court of Appeal also addressed the News-Press' argument that the First Amendment prohibited liability on Respondent's implication claim because the claim was substantially true. The court acknowledged that it was "uncertain" whether this Court's First Amendment jurisprudence requires "independent" (as opposed to deferential) review of a jury's findings regarding substantial truth. App. 70a. But assuming without deciding that independent review was required, the court ruled that it could not conduct such a review in light of the jury's inconsistent findings. Accordingly, while

the court concluded that a new trial was necessary, it ruled that it was not yet in a position to determine whether the News-Press was entitled to prevail in the case on the basis of the substantial truth issue. App. 71a.

4. After the California Supreme Court denied review of this decision (with two justices dissenting), App. 93a, the superior court held a second trial, once again on the basis that Respondent was a private figure during the relevant time periods. This time, Respondent asked the jury to find that three statements in the articles were false and defamatory:

> (1) "1972-1976: Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities and Exchange Commission."
>
> (2) "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."
>
> (3) "The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations."

App. 10a. He also renewed his defamation-by-implication claim and his request for punitive damages. *Id.*

Although much of the evidence introduced at the first trial was presented again, the parties presented some new evidence as well. Most important, SEC attorney Benjamin Green testified for the first time. Green testified that the SEC had initiated the investigation that resulted in Marlin's federal indictment. In addition, Green testified that during the SEC's

investigation, he also looked at Respondent, as Marlin's former partner, to determine whether Respondent has been involved with Marlin in defrauding investors. App. 22a. None of Respondent's witnesses were from the SEC, and none had been involved at the beginning of the investigation; consequently, it was undisputed that the SEC's investigation of the frauds that ultimately sent Marlin to prison initially included Respondent.

Before the case was put to the jury, the superior court issued a directed verdict for the News-Press with respect to Respondent's request for punitive damages, finding that the newspaper did not act with actual malice in publishing the articles. The jury then found that the three statements and the alleged implication in the two articles were actionable and awarded Respondent $2.25 million in compensatory damages. App. 11a-12a.

5. Both parties appealed again, and the Court of Appeal affirmed. App. 1a-50a. The court adhered to its previous public-figure ruling under the law of the case doctrine, and it rejected the News-Press' substantial truth defense. App. 12a-26a. On the latter point, the court noted that there were "numerous factual battles," App. 21a n.6, but it declined to conduct an independent review of the facts. Instead, the court held that, even in light of Green's new testimony, "[t]here is *substantial evidence* to support the jury's findings that the challenged statements and the implication were not substantially true." App. 26a (emphasis added). The court also rejected Respondent's cross-appeal, affirming the trial court's ruling that the News-Press did not publish the articles with actual malice. App. 34a-46a.

6. On January 14, 2004, the California Supreme Court again denied discretionary review of this case. App. 55a.

REASONS FOR GRANTING THE WRIT

The Court of Appeal's decision in this case implicates two divisions of authority that currently infect First Amendment jurisprudence: (1) a seven-to-four split concerning whether the First Amendment requires appellate courts in a libel case independently to review a jury's findings that allegedly defamatory statements are not substantially true; and (2) a wide disagreement over whether a person who has or seeks control over a business in a pervasively regulated industry is a "public figure" for the limited purpose of media coverage of his business dealings. Both of these conflicts impede the proper implementation of libel law, as well as the Constitution's free speech and free press guarantees, in courts across the Nation.

This case presents an excellent vehicle for resolving these conflicts. The underlying facts and proceedings below squarely present each issue and dictate that reversal in either respect would be outcome-determinative. Furthermore, careful reflection reveals that the Court of Appeal misconstrued this Court's precedent in resolving each issue. This Court should not allow such misinterpretations of vital First Amendment principles to stand.

I. This Court Should Resolve The Conflict Over Whether An Appellate Court In A Libel Case Must Independently Review A Jury's Finding That an Allegedly Defamatory Statement Was Not Substantially True.

A. State And Federal Courts Are Divided On This Issue.

In *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984), this Court held that the First Amendment prohibits an appellate court in a libel case from deferring to a jury finding

of actual malice on the ground that substantial evidence supports the finding. Instead, appellate courts "must *independently decide* whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* at 511 (emphasis added). Drawing on this Court's landmark decision in *New York Times Co. v. Sullivan,* 376 U.S. 264 (1964), this Court explained that such an independent appellate examination is necessary to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose,* 466 U.S. at 508 (quoting *Sullivan,* 376 U.S. at 285).

Over the years since *Bose*, federal and state courts, as well as commentators, have become increasingly confused over whether "*Bose*'s mandate of independent appellate review encompasses only the issue of actual malice" or whether it also applies to other elements of libel cases, such as "falsity." *Brown & Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119, 1128-29 (7th Cir. 1987) (noting that it is an "open question"); *see also Newton v. National Broadcasting Co.,* 930 F.2d 662, 669 n.7 (9th Cir. 1990) ("The standard of review for the falsity element is also unresolved."); Robert D. Sack, *Sack on Defamation* § 16.5.3, at 16-43-44 (3d ed. 2003) (noting confusion and conflicts over whether independent review applies to other elements of defamation actions); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation,* 58 Ohio St. L. Rev. 1753, 1772 & n.70 (1998) ("The exact stringency of *Bose* is not clear: it may require an independent review of actual malice; it may also apply to findings of falsity, negligence, the opinion/fact distinction, 'of and concerning the plaintiff,' and even defamatory content."); David Anderson, *Is Libel Law Worth Reforming?,* 140 U. Pa. L. Rev. 487, 497 (1991) ("Whether other issues [in addition to actual malice] may also be subject to independent review is open to question. The

rationale – that judges must determine whether the evidence is constitutionally sufficient to surmount the constitutional barrier erected by the actual malice standard – seems equally applicable to any other constitutional prerequisite. . . . [B]ut the scope of independent review remains unclear.").

In this case, the California Court of Appeal initially acknowledged that "[t]he parameters of an independent review in defamation cases are uncertain" and assumed that such review *did* apply to the News-Press' "substantial truth" defense. App. 70a. After the second trial, however, the court refused to independently review the jury's finding of falsity, ruling instead that "[t]here is *substantial evidence* to support the jury's findings that the challenged statements and the implication were not substantially true." App. 26a (emphasis added). The court explained that the standard of review it was applying required it "to credit the plaintiff with every possible inference a juror could draw." App. 21a (quotation omitted). Respondent has contended that this holding accords with the California Supreme Court's prior statement that appellate courts "must make an independent assessment of the entire record . . . *only as it pertains to actual malice*. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review." *McCoy v. Hearst Corp.*, 727 P.2d 711, 715 (Cal. 1986) (emphasis added).

The Court of Appeal's decision implicates a deep conflict among federal courts of appeals and state courts of last resort concerning whether *Bose*'s independent review mandate applies to jury findings regarding substantial truth in a libel case. In addition to the California ruling here, six courts (including two federal courts of appeals and three state courts of last resort) have ruled that "the First Amendment commands . . . only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, [Supreme

Court authorities] support a sufficiency of the evidence analysis." *Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351, 359 (8th Cir. 1996); *accord Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 841-42 (6th Cir. 1988) (applying "clearly erroneous" standard to jury's findings on falsity and independent review standard to its actual malice determination), *aff'd on other grounds*, 491 U.S. 657 (1989)[1]; *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 117 (Tex. 2000) ("[W]e review the jury's verdict on both defamatory meaning and falsity under our traditional 'no evidence' standard. Under that standard, we must hold for [the plaintiff] on this point unless no reasonable jury could have found the broadcast to be false or defamatory."); *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1997) ("[O]ur scope of review on the issue of actual malice is *de novo* review to determine if there is clear and convincing evidence. However, we do not agree this is the proper scope of review on the issue of falsity. . . . [W]e are required to conduct an independent *de novo* review of the record only on the issue of actual malice."); *Caruso v. Local Union No. 690*, 730 P.2d 1299, 1302-03 (Wash. 1987) ("There must be substantial evidence upon which the jury could have rested its verdict" on falsity.) (internal quotation omitted); *Morris v. Warner*, 770 P.2d 359, 366, 368-69 (Ariz. App. 1989) ("Except as to the element of actual malice, our standard of review [in a defamation case] is limited to whether substantial evidence exists to support the jury's verdict."; applying substantial evidence standard to falsity issue).

In direct opposition to these decisions, four courts (two federal courts of appeal and two state high courts) have held that insofar as a jury's libel verdict raises questions of compliance with the element of falsity, "it warrants

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[1] This Court's opinion in *Connaughton* dealt only with the issue of actual malice. *See* 491 U.S. at 663-64 (recounting questions presented). The falsity of the contested statement was no longer at issue.

independent review." *Velleiux v. National Broadcasting Co.*, 206 F.3d 92, 108 (1st Cir. 2000); *accord Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988) (In reviewing jury verdict or summary judgment ruling "where the constitutional prerequisites of falsity and actual malice are at issue, an appellate court has an obligation to 'make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the filed of free expression.'") (quoting *Bose*, 466 U.S. at 499) (additional internal quotation omitted); *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 114 (Mich. 1991) ("The principle of independent review logically extends to determining whether a plaintiff satisfies her burden of proving falsity."); *Deaver v. Hinel*, 391 N.W.2d 128, 131-33 (Neb. 1986) (applying *Bose* standard to jury's actual malice finding and to its finding of falsity). Second Circuit Judge Robert Sack reaches the same conclusion in his leading treatise on defamation law. *See Sack on Defamation, supra*, at § 16.5.2 (2003) (although courts "differ as to whether the requirement of independent review applies to aspect of the claim other than 'actual malice,'" . . . truth would appear to be the kind of 'constitutional fact' for which independent review is required.").

It is now clear that this division of authority is intractable. Only this Court can resolve it.

B. The California Court of Appeal's Refusal To Undertake Independent Review Here Contravenes This Court's Precedent.

A careful review of this Court's precedent demonstrates that rule of deferential review applied below is erroneous. Those appellate courts holding that the First Amendment requires independent review of findings of falsity are correct.

In *Bose,* this Court explained that in cases in which "the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated, . . . the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of the character which the First Amendment [protects.]" 466 U.S. at 508 (internal quotations and citations omitted). Accordingly, the independent review doctrine is not just a creature of libel cases; it applies to all factual findings that define "the limits of [an] unprotected category" of speech. *Id.* at 505.

This Court, for example, has independently reviewed findings that a parade did not include expressive activity, *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston,* 515 U.S. 557, 567 (1995); that words were likely to cause the average person to fight, *Street v. New York,* 394 U.S. 576, 592 (1969); that an alleged breach of the peace gave rise to imminent lawless action, *Hess v. Indiana,* 414 U.S. 105 (1973) (per curiam) & *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963); that expression depicted sexual activity in a patently offensive way, *Jenkins v. Georgia,* 418 U.S. 153, 159-61 (1974); and that expression appeals to "prurient interest," *Miller v. California,* 413 U.S. 15, 25 (1973). The question here, therefore, is whether proof of falsity – like actual malice in *Bose* and the other facts in the preceding cases – marks a constitutional boundary between protected and unprotected speech.

This Court's First Amendment jurisprudence leaves no doubt that falsity marks such a boundary. This Court has explained that states may punish libelous speech in part because "[t]here is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974). Thus, in *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986), this Court held that "where a newspaper publishes speech of public concern," even "a private-figure

plaintiff cannot recover damages [for libel] without also *showing that the statements at issue are false*." *Id.* at 768-69 (emphasis added); *see also Herbert v. Lando,* 441 U.S. 153, 176 (1979) (plaintiff must prove a "false publication"); *Velleiux,* 206 F.3d at 108 (falsity element is "constitutionally mandated"). And the test for falsity is whether or not the challenged statement, irrespective of any minor inaccuracies, was "substantially true" – that is, whether the statement "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson v. New Yorker Magazine,* 501 U.S. 496, 517 (1991) (quotation and citation omitted).

In sum, because the First Amendment requires proof of falsity in libel cases just as surely as it required proof of actual malice in *Bose*, the California court here plainly erred in reviewing the jury's finding of falsity only for "substantial evidence."

C. Application Of The Proper Standard Of Review Is Critical In Cases, Like This One, Involving The Exercise Of Constitutional Rights.

This Court frequently has recognized the importance of resolving conflicts regarding the proper standard of review on appeal, and it has granted certiorari several times in recent Terms on such issues. *See, e.g., Cooper Industries v. Leatherman Tool Group,* 532 U.S. 424 (2001) (standard of reviewing findings regarding whether punitive damages are "grossly excessive"); *Dickinson v. Zurko,* 527 U.S. 150 (1999) (findings such as obviousness under Patent Act); *General Elec. Co. v. Joiner,* 522 U.S. 136 (1997) (findings that scientific evidence is unreliable); *Greene v. Georgia,* 519 U.S. 145 (1996) (per curiam) (findings of juror bias); *Koon v. United States,* 518 U.S. 81 (1996) (findings that a standard-range criminal sentence is too harsh); *Ornelas v. United States,* 517

U.S. 690 (1996) (findings of reasonable suspicion and probable cause under Fourth Amendment).

Standards of review are particularly critical in the context of the Free Speech and Free Press Clauses. "The question whether the evidence in the record is of the convincing clarity required to strip the utterance [at issue] of First Amendment protection is not merely a question for the trier of fact." *Bose,* 466 U.S. at 511. It is a legal issue calling for sensitive and often nuanced judgment. Thus, "it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." *Waters v. Churchill,* 511 U.S. 661, 669 (1994) (plurality opinion).

Independent review is one such procedure. When juries in libel cases return verdicts holding media defendants liable, the defendants almost always appeal. *See. e.g.,* Susan M. Gilles, *supra,* 58 Ohio St. L. Rev. at 1771 & n.68 (1998) (defendants appeal over 80% of such verdicts). These appeals, as here, "frequently" involve disputes over the substantial truth of statements describing governmental investigations or legal proceedings. *Rouch v. Enquirer & News,* 487 N.W.2d 205, 215 (Mich. 1992). Because juries sometimes "give short shrift" to such issues, *id.* at 214, independent appellate review often makes the difference between the execution of an unfounded libel judgment and vindicating constitutionally protected news reporting. *Compare Velleiux,* 206 F.3d at 109-14 (independently reviewing substantial truth issue and reversing $525,000 judgment); *Locricchio,* 476 N.W.2d at 121-34 (same; reversing $3 million judgment); *Rouch,* 487 N.W.2d at 210, 214 (same; reversing $1 million judgment) *with Lundell,* 98 F.3d at 355, 359 (refusing independently to review substantial truth issue and affirming $1 million judgment); *Turner,* 38 S.W.3d at 113, 117 (same; affirming $3.25 million judgment).

Independent review would likely be decisive here as well. Respondent bases his case on three statements, as well as an alleged implication, that federal authorities investigated him for the same investor frauds as sent his former partner to prison. Yet at an SEC attorney testified at trial that the SEC, which initiated the investigation that resulted in the indictment of Respondent's business partner, did in fact look at connections between the two partners during its fraud investigation. App. 22a. Furthermore, it is undisputed that Respondent faced civil fraud allegations during this period and that other federal law enforcement agencies investigated Respondent and his business partner for other alleged criminal activity in the context of their investment companies. App. 5a, 22a. In light of this evidence alone, there is strong reason to believe that *de novo* appellate review of the substantial truth of the challenged statements would reveal that the articles did not have "a different effect on the mind of the reader from that which the pleaded truth" – to any extent it diverged from the articles – "would have produced." *Masson,* 501 U.S. at 517 (quotation omitted).

In fact, found the Court of Appeal's only rationale for finding the News-Press' evidence of substantial truth insufficient to defeat Respondent's claims was "ambiguous" and "conflicting inferences" could be drawn from it. App. 21a n.6. This means that if the Court of Appeal had independently reviewed the evidence, it could not have found that Respondent had met his burden of proof. When evidence of falsity is "ambiguous" or "the factfinding process [is] unable to resolve conclusively whether the speech is true or false, . . . the burden of proof" – which the Constitution puts squarely on the plaintiff – "is *dispositive*": the libel claim must be rejected. *Hepps,* 475 U.S. at 776-77 (emphasis added); *see also Locricchio,* 476 N.W.2d at 122 (same analysis applies to defamation-by-implication claim).

II. This Court Should Resolve Whether Individuals Who Own Or Control Businesses In Pervasively Regulated Industries Are "Public Figures" For The Limited Purpose Of Media Coverage Of Their Business Dealings.

A. There Is Substantial Disagreement In Lower Courts Concerning This Issue.

When, as here, a court has determined that a newspaper has acted negligently but not with actual malice in publishing articles about person who is involved in a matter of public concern, the First Amendment prohibits the plaintiff from recovering damages if he was a "public figure" when the articles were published. If, however, a defamatory story concerns a private figure, the First Amendment permits the plaintiff to recover damages upon a showing of mere negligence. *Gertz,* 418 U.S. at 347 (First Amendment); *see also* App. 34a (citing *Khawar v. Globe Internat, Inc.,* 965 P.2d 696, 708 (1998)) (California law).

In *Gertz,* in the course of explaining why private figures may recover damages upon a lesser showing of fault, this Court stated that:

> For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

> . . . [On the other hand, a] private individual . . . has not . . . assumed an "influential role in ordering society." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result).

418 U.S. at 345. This Court has never elaborated significantly on this discussion of public versus private figures. Indeed, this Court has never even settled on whether this passage in *Gertz* sets a "general definition of 'public figures,'" *Hutchinson v. Proxmire,* 443 U.S. 111, 134 (1979), or merely "identifie[s] two ways in which a person may become a public figure." *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 164 (1979).

As a result of this lack of guidance, the law that lower courts apply in determining who is and who is not a public figure has become increasingly "conflicting" and "chaotic." Sack, *supra,* § 5.3.1, at 5-17; Mark D. Walton, *The Public Figure Doctrine: A Reexamination of* Gertz v. Robert Welch, Inc. *in Light of Lower Federal Court Public Figure Formulations,* 16 N. Ill. U. L. Rev. 141, 159 (1995) ("The U.S. Supreme Court's failure to articulate a precise standard of determining a defamation plaintiff's status that can be applied to varying fact situations had led to inconsistent and conflicting lower court determinations with regard to [the public figure] issue."); *see also* Harry W. Stonecipher & Don Sneed, *A Survey of the Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine,* 46 Ark. L. Rev. 303, 305 (1993) ("[C]ases involving similar facts sometimes [are] decided differently by different courts in different jurisdictions."). One federal court has characterized *Gertz*'s obtusity as "a fundamental problem in the resolution of libel cases," *Harris v. Tomczak,* 94 F.R.D. 687, 697 (E.D. Cal. 1982), and one commentator has noted that "the need for the Court to clear up the confusion surrounding these issues seems obvious." Walton, 16 N. Ill. U. L. Rev. at 172.

The uncertainty that infects public-figure jurisprudence is particularly acute with respect to categorizing individuals who own or control important or controversial businesses. The Court of Appeal here held that even though Respondent was attempting to become the principal owner of a heavily regulated business whose operation greatly affected the public, "neither [Respondent's] shareholder status, his professional status, nor his status as a prominent business person invited public attention" sufficient to render him a limited-purpose public figure. App. 76a.[2] At least two other state high courts have reached similar conclusions. *See Sisler v. Gannett Co.*, 516 A.2d 1083, 1090 (N.J. 1986) (bank cofounder and president not a public figure for limited purpose of newspaper article questioning propriety of certain bank loans); *Antwerp Diamond Exchange v. Better Business Bureau,* 637 P.2d 733, 737 (Ariz. 1981) (president of corporate seller of precious stones not limited public figure).

Still other courts have held that businesses themselves, no matter how pervasively regulated, are not limited-purpose public figures unless they are embroiled in an existing public controversy. As the Fourth Circuit explained, "We do not believe that the existence of an ongoing public interest in the stability of society's financial institutions and markets, or in the supervision of the gaming industry, or in the regulation of

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[2] The Court of Appeal's adherence to this ruling after the second trial under the law-of-the-case doctrine does create any procedural impediment to reviewing the merits of its initial decision. Because this Court lacks jurisdiction over interlocutory state court rulings, "[i]t has long been established . . . that '[this Court has] jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and [the Court's] right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case.'" *Hathorn v. Lovorn,* 457 U.S. 255, 262-62 (1982) (quoting *Reese v. Georgia,* 350 U.S. 85, 87 (1955)); *accord* Richard H. Fallon, et al., The Federal Courts and the Federal System 642 (4th ed. 1996); Robert L. Stern, Supreme Court Practice 104-05 (7th ed.1993) (collecting cases).

utilities automatically elevates every [business in] the regulated class to public figure status." *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 (4th Cir. 1989); *accord Bank of Oregon v. Independent News,* 693 P.2d 35, 42 (Or. 1986).

In contrast, four federal courts of appeals, as well as several federal district courts, have held that those who own or control heavily regulated businesses are public figures for the limited purpose of media coverage of their business dealings. *See Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 620-21 (2d Cir. 1988) (officers and directors of nonprofit organization public figures for limited purpose of their "business activities"); *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1494-98 (11th Cir. 1988) (owners of a business in "strictly regulated, high-profile industry" are limited purpose public figures); *Tavoulareas v. Piro,* 817 F.2d 762, 772-73 (D.C. Cir. 1987) (en banc) (president of oil company limited purpose public figure regarding business activities); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987) (president of soft drink bottling company limited purpose public figure); *Girod v. El Dia,* 668 F. Supp. 82, 85 (D.P.R. 1987) ("influential businessman" in business and banking communities is a public figure "under those circumstances"); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974) (president of taxicab company limited purpose public figure). One state appellate court has held that officers of a failed savings and loan were limited purpose public figures under facts almost identical to this case. *See ABC, Inc. v. Gill*, 6 S.W.3d 19, 35-36 (Tex. App. 1999).

Numerous other courts have reached the same conclusion with respect to pervasively regulated businesses themselves, on the ground that tight regulation "demonstrates that the public (through its elected officials who impose the regulation) deems certain activities of such great public interest that it is unwilling to countenance" them being governed by standards applicable to private entities. *Beech Aircraft v.*

National Aviation Underwriters, 11 Media L. Rep. 1401, 1411 (D. Kan. 1984) (collecting cases); *accord Coronado Credit Union v. KOAT Television, Inc.,* 656 P.2d 896 (N.M. 1982); *American Benefit Life Ins. Co. v. McIntyre,* 375 So.2d 239, 242 (Ala. 1979).

There is, of course, some variance in the background circumstances of each particular case with respect to the particular individuals and businesses involved. But as this Court recognized in *Gertz* itself, the "ad hoc resolution" of First Amendment issues in libel cases is unacceptable, for it leads to "unpredictable results and uncertain expectations." 418 U.S. at 343. Accordingly, federal courts must strive, to the extent possible, to "lay down broad rules of general application." *Id.* at 343-44.

It is possible to articulate a general rule here based upon only a few easily ascertained facts: the plaintiff's position in the company at issue, the pervasiveness of governmental oversight over the business, and the subject of the challenged news story. Several courts hold that key individuals in heavily regulated businesses are public figures for the limited purpose of media coverage of their business dealings, and some (such as the court below) reject this notion. This Court can and should bring order to this inconsistency.

B. The Court Of Appeal's Refusal To Treat Respondent As A Limited Purpose Public Figure Contravenes This Court's Precedent.

Although this Court's public-figure jurisprudence is scant, a careful reflection on its driving purposes demonstrates that those courts holding that individuals in positions of influence and control over tightly regulated businesses are public figures for that limited purpose are correct. This Court's opinion in *Gertz* recognized that the touchstone for distinguishing a public from a private figure is whether the

individual has "assumed an influential role in ordering society." *Gertz,* 418 U.S. at 345 (quoting *Butts,* 388 U.S. at 164) (Warren, C.J., concurring). By any measure, a person who voluntarily seeks or takes control of a prominent and highly regulated business assumes an influential role in ordering society.

Contrary to the Court of Appeal's decision here, this conclusion does not depend on whether the influential businessperson at issue has thrust himself into the fore of an already-existing public debate concerning his particular company. While this Court's decision in *Hutchinson* confirms that taking a leading role in a public debate may be sufficient to establish public figure status, 443 U.S. at 135, it cannot be that it is necessary to do so. The decisions a powerful business executive makes can exert a greater influence over the ordering of society than anything he says. Especially when those decisions shape an industry (such as the savings and loan industry at the relevant time here) that is embroiled in controversy and that is so crucial to the public welfare that it is pervasively regulated, it can hardly be doubted that a person who owns or controls a business "invites attention and comment" and assumes "the risk of closer public scrutiny than otherwise might be the case" simply by virtue of his special position. *Gertz,* 418 U.S. at 344-45, 352; *cf. Skinner v. Railway Executives' Railway Ass'n,* 489 U.S. 602, 627 (1990) (voluntary "participation in an industry that is regulated pervasively" reduces a person's expectation of privacy under Fourth Amendment). If a heretofore unknown person assumed substantial control over a leading telecommunications or energy company, it would hardly make sense for his public-figure status to turn on whether (or how often) he held press conferences.

The California courts' requirement that powerful businesspeople affirmatively thrust themselves into some existing public controversy is particularly wrongheaded

because it disfavors one of the most valuable species of news reporting: investigative journalism. A common premise of investigative journalism is that a reporter discerns a story that significantly affects the public but has not yet been exposed to media scrutiny or debate – perhaps because the individual involved has worked to conceal the matter from public view or otherwise has exerted power behind-the-scenes.[3] So long as the substance of an investigative report involves a newsworthy topic, the First Amendment should not hold statements regarding important individuals in the report to a higher standard than similar statements in a story that covers already well-trodden ground.

C. It Is Vital That This Court Bring Order To The Limited Public Figure Doctrine Without Further Delay.

Disputes regularly arise in libel cases concerning whether an individual mentioned in a news story is at least a limited purpose public figure. Indeed, "[p]erhaps no element more frequently determines the outcome of defamation suits than the plaintiff's designation as either a public or private figure." *See, e.g.,* Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine,* 33 Hous. L. Rev. 1027, 1028 (1996). Given the importance of such designations, it is intolerable to allow the breathing room the press requires to

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[3] For recent examples of such stories, see Dan Richman, *Execs Took Big Bonuses Before Sale To Cingular,* Seattle Post-Intelligencer, Feb. 20, 2004, at A1 (breaking story regarding financial dealings of executives that drastically reduced value of employees' stock options); Jonathan J. Higuera, *Smith & Wesson Chief Did Time for '50s Armed Heists,* Ariz. Republic, Feb. 12, 2004, at A1 (breaking story regarding new chairman's previously undisclosed criminal record that led to his resignation two weeks later); David Haffenreffer & Allen Wastler, *Money & Markets: Grasso's Cushy Contract,* Money & Markets (CNN television broadcast, Aug. 27, 2003) (breaking story regarding large compensation package that led to resignation of chairman of New York Stock Exchange).

report on prominent individuals implicated in news stories, *see, e.g., Sullivan,* 376 U.S. at 279-80, to turn upon the jurisdictions in which those individuals reside.

This is especially true in the context of the press's coverage of prominent businesspeople. When people who control closely regulated businesses engage in malfeasance, members of the public can suffer greatly – whether in their pocketbooks or in their trust in the value of private enterprise. *See, e.g.,* Paul Krugman, *Executives Gone Wild,* N.Y. Times Book Review, Feb. 8, 2004, at 9 (reviewing two books concerning corporate governance abuses in 1990's). The savings and loan collapses of the 1980's, and the more recent frauds in the accounting and mutual fund industries, are only the most egregious examples of this reality. When any prominent businessperson misleads regulators or investors, or otherwise is unworthy of public confidence, the local populace has a tremendous interest in ferreting out that individual's actions *before* significant damage occurs. Now more than ever, this Court should ensure that the First Amendment strikes the proper balance between protecting the media's ability to publish such proactive stories and respecting businesspersons' privacy in their personal lives.

This case provides an ideal vehicle for clarifying this sphere of public-figure jurisprudence. The banking industry is pervasively regulated, and Respondent sought a controlling interest in a region's oldest and largest savings and loan. Respondent also submitted an 878-page application to state regulators in an effort to take official control over the Bank. When the News-Press learned of Respondent's application, its ensuing investigation and news articles revealed timely information concerning a history of accusations about Respondent's alleged investment irregularities and other unsavory business dealings. And, as the Court of Appeal explicitly confirmed, any inaccuracies in these articles were not a result of actual malice. App. 46a. This means that the jury's $2.25 million

verdict against the News-Press stands or falls according to whether Respondent was a public figure for the limited purpose of coverage of his business dealings.

This Court should grant review to clarify that the First Amendment precludes such major monetary judgments under these circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Court of Appeal, Second District, Division 3, California.

LEONARD M. ROSS, Plaintiff, Appellant, and Cross-Respondent,

v.

SANTA BARBARA NEWS PRESS, etc., et al., Defendants, Respondents, and Cross-Appellants.

No. B151127.
(Los Angeles County Super. Ct. No. C 744583).

Sept. 26, 2003
As Modified on Denial of Rehearing Oct. 24, 2003.

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph Kalin, Judge. Affirmed.

ALDRICH, J.

INTRODUCTION

On November 27, 1988, and on February 28, 1989, the Santa Barbara News-Press (the News-Press) published front-page articles about Leonard M. Ross (Ross) and his potential purchase of a large percentage ownership in Santa Barbara Savings and Loan Association's parent company. Ross filed a civil lawsuit against the News-Press alleging the two articles were defamatory. Ross contended the articles erroneously implied that he had been investigated by the government for

the same investor frauds that had sent his former partner Barry S. Marlin (Marlin) to prison. Ross also contended that the articles contained three false statements.

The second trial resulted in a $2,250,000 jury verdict in favor of Ross. Ross filed an appeal and News-Press filed a cross-appeal. We affirm.

PROCEDURAL AND FACTUAL SUMMARY

1. PROCEDURE.

a. *Initial proceedings and the first trial.*

On November 22, 1989, Ross filed a complaint for defamation.

A jury trial resulted in a $7.5 million verdict against the News-Press. Thereafter, the Honorable Harvey A. Schneider granted the News-Press's motion for new trial because (1) the verdicts were internally inconsistent, and (2) the $2.5 million emotional damages award was excessive.

b. *Proceedings upon remand.*

On remand, the case was originally assigned to the Honorable Paul Boland, who ruled on various motions. On March 8, 2000, the case was transferred to the long cause department. The hearing to consider in limine motions set on March 22, 2000, was vacated, as was the April 10, 2000 trial date. Thereafter, the case was re-assigned, and the Honorable Joseph R. Kalin presided over a bifurcated jury trial.

On the issue of liability, Ross presented his evidence to the jury. The News- Press moved for a directed verdict on the issue of malice, which was granted. The jury rendered verdicts on liability upon special verdicts. The jury found for Ross,

finding the three statements and the implication false and defamatory.

The damage phase of the trial proceeded. The jury awarded Ross a total of $2,250,000. Judgment was entered in favor of Ross.

Ross and the News-Press appealed.

2. FACTS.[1]

a. *Introductory comments.*

The case is based on two front-page articles about Ross that appeared in the News-Press, a daily newspaper published by The New York Times Company. Kathleen Sharp (Sharp) wrote the articles and David McCumber (McCumber) was executive editor.[2] The impetus for the articles was Ross's attempt to increase his ownership share in the parent company of the Santa Barbara Savings and Loan (Santa Barbara S&L) from 9.9 percent to 24.9 percent. Prior to writing the articles, Sharp conducted an investigation into Ross's background and his activities in trying to make the purchase.

Before detailing the contents of the articles, it is important to describe some events involving Ross.

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[1] We have construed the facts in the light most favorable to the judgment.

[2] The News-Press, The New York Times Company, Sharp, and McCumber are all named as defendants and appear on appeal as respondents and cross-appellants. Unless otherwise significant, we collectively refer to these parties as the News-Press.

b. *Ross's background and the events prior to Ross's attempt to purchase a greater share in the Santa Barbara S&L.*

Ross was born in New York. He was raised in the lower eastside in a government housing project. Ross moved to California when he was 16 years old. After graduation from high school, he went to the University of California at Los Angeles (UCLA), where he also attended law school. In November 1968, within a few months of graduating from law school, Ross met Marlin. Ross formed a partnership with Marlin in approximately February 1969. The two designed and sold real estate tax shelter investments. Ross ended his relationship with Marlin in 1971. At that time, Marlin acquired certain assets from Ross, and Ross acquired certain assets from Marlin.

In 1971, Marlin accused Ross of forcibly holding him prisoner while Ross and two thugs examined the business books and records. Marlin alleged he had been struck by a gun and forced into signing documents that conveyed his interest in certain business ventures to Ross.

From 1972 to 1974 Ross was investigated for violating the Hobbs Act (business taken through extortionate means, 18 U.S.C. § 1951), stemming from Marlin's accusations that Ross had engaged in extortion, kidnapping, and pistol-whipping. This investigation emanated from Marlin's 1971 accusations. Ross was a target of this investigation, which was conducted by the Federal Bureau of Investigation (FBI), a federal grand jury, and the Los Angeles Strike Force of the Organized Crime and Racketeering Section of the United States Department of Justice. The investigation did not include charges of fraud. In 1973, Ross testified before the federal grand jury under examination by Justice Department special attorney James A. Twitty (Twitty). In a 1973 report, FBI special agent Wayne W.

Hill (Hill) summarized the 1972-1974 probe. At the end of the investigation, no charges were filed against Ross.

In 1976, Marlin was investigated for investor fraud. The investigation was launched by attorney Benjamin F. Green (Green) at the Securities Exchange Commission (SEC). Thereafter, the probe was turned over to the United States Attorney's Office, the United States Postal Inspector, and the Internal Revenue Service (IRS). As a result of the investigation, a multi-count indictment was filed against Marlin in 1977. It accused Marlin of forming and promoting fraudulent investment programs, including real estate syndications from November 1973 to March 1976. Marlin's only defense was that he had been compelled to steal money from investors to pay Ross after Ross forced him to turn over company assets and sign notes to pay for those assets. In 1977, a federal grand jury indicted Marlin. In 1978, Marlin pled guilty, and thereafter he was imprisoned.

United States Attorney Thomas J. Nolan (Nolan) and Post Office Inspector Herman "Bookie" Almond (Almond) were in charge of the 1976 investigation. Marlin was the target of the inquiry. Ross was not investigated for the crimes that sent Marlin to prison.

In 1977, persons who had invested in limited partnerships and joint ventures promoted by Marlin and Ross filed civil lawsuits against Marlin, Ross, and a number of other individuals and entities. These lawsuits were consolidated into a case styled *Goodrich v. Marlin*. This federal lawsuit alleged that a variety of investment vehicles, from January 1969 through February 1976, were fraudulent and violated the Securities Exchange Act. The third amended complaint alleged that from 1969 to May 1971, Ross was a disclosed principal and Marlin's partner. It also alleged that after Ross and Marlin formally severed their ties in 1971, Ross "remained

an undisclosed principal and conspirator with. . . Marlin in the various investment schemes. . . ."

Ross's insurance companies refused to defend these lawsuits. Ross sued his insurers. The insurance companies eventually settled with Ross, paying him $20 million. The investor lawsuits were also settled.

c. *Ross's attempt to purchase a greater share in the Santa Barbara S&L.*

Ross and his wife purchased a home near Santa Barbara. Santa Barbara S&L was the region's largest and oldest savings and loan. In 1988, Ross owned 9.9 percent in the Santa Barbara S&L. Ross received federal regulatory approval to increase his ownership share to 24.9 percent. In 1988, he filed an application with the California Department of Savings and Loan to increase his percentage ownership and was awaiting approval.

In July 1988, Ross spoke at a shareholder's meeting, attended by Patrick O'Hara (O'Hara), the News-Press's business editor. In August 1998, McCumber and O'Hara assigned to Sharp, a business writer, the task of writing a profile about Ross. Sharp investigated for more than three months. During the investigation, Sharp reviewed hundreds of pages of court records pertaining to many lawsuits involving Ross and his companies, a copy of the 1973 FBI report, grand jury transcripts of the 1972-1974 criminal investigation of Ross, and the Goodrich complaint. Sharp also talked to approximately 100 people, including Ross and Nolan.[3] Sharp did not examine the Marlin indictment. Sharp wrote numerous

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[3] Sharp testified that Nolan had told her there was insufficient evidence to prosecute Ross for the crimes that sent Marlin to prison. Nolan's testimony is discussed in section 4.c.(l) of this opinion.

drafts of the first article, which eventually appeared on November 27, 1988.

After the first article was published, Ross withdrew his application with the California Department of Savings and Loan. The News-Press published a second article on February 28, 1989. After each article was published, Ross sent a retraction demand.

d. *The articles.*

We described the two articles in our first appellate opinion, with appropriate additions and deletions, as follows.

"The first article appeared on Sunday, November 27, 1988, with the headline 'S&L investor: Inquiries, suits mark career.' It contained 102 paragraphs, plus a sidebar box consisting of a 15-item chronology. The article began with the statement, 'Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law-enforcement agencies, is seeking to increase his stake in Santa Barbara Savings and Loan Association's parent company to almost 25 percent of outstanding shares.' The next few paragraphs stated Ross had collected $20 million in damages from insurance companies who had defended him in investor lawsuits and his partner, Barry S. Marlin, had been convicted of defrauding investors. The beginning of the article also stated that Ross had denied any wrongdoing and stated he had been unfairly tainted with Marlin's problems.

"In the subsequent paragraphs, the article reported the following. Ross had obtained federal regulatory approval, and was awaiting state regulatory approval, for his proposal to buy shares sufficient to increase his shareholdings from 9.9 percent to 24.9 percent in Financial Corporation of Santa Barbara, the holding company of Santa Barbara [S&L]. Santa Barbara S&L

had been troubled in recent years and state regulators were taking a close look at Ross's share-purchase proposal.

"Numerous paragraphs discussed Ross's resolution of investor lawsuits and the fact that Ross 'pocketed more than $20 million' when he sued his former insurance companies. The balance of the article reported at length the results of the newspaper's study of court documents, transcripts of federal proceedings and comments of various individuals, including comments by Ross and his attorneys. These matters concerned Ross's business affairs during the period 1968 to 1973, and ensuing investigations and litigation, some of which was ongoing at the time of publication. These business affairs derived from Ross's association with Marlin. Ross and Marlin were partners in an investment firm from early 1969 until late 1971, when Ross ['formally severed his business relationship with Marlin....'] The article discussed Marlin's criminal activities, Ross's association with Marlin, the investor frauds committed by Marlin, and the fact Marlin was investigated by governmental agencies for these frauds and eventually incarcerated. Additionally, the article discussed accusations Marlin had leveled against Ross for pistol-whipping, extortion, and kidnapping, claiming Ross had forced him to turn over part of their business ventures. [The article also discussed a case brought by investors, the Goodrich litigation, the settlement of this investor lawsuit, as well as the bankruptcy of many of the real estate partnerships.]

"The article contained additional information about Ross, such as he was valedictorian of his law school class at UCLA and lived in the Hearst-Davies mansion in Beverly Hills. It reported one of Ross's attorneys was Howard L. Weitzman, who had represented John DeLorean and Mike Tyson; Ross had successfully sued insurance companies for acting in bad faith [for not defending him against investor lawsuits]; Ross's claim that he] had ended his association with Marlin before Marlin began defrauding investors; after

investigating Ross's affairs, law enforcement authorities had not accused Ross of any crimes; and investors who sued Ross had never established any wrongdoing on his part.

"The accompanying sidebar chronology began in 1968. The first item stated Ross graduated first in his law school class]. The fourth item stated that from 1972-1976 'Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission.' [The last item stated in 1988 Ross had settled his bankruptcy case and also applied for approval to purchase additional shares of the Santa Barbara S&L. Marlin is mentioned in eight of the fifteen boxes.

"The second article, captioned 'Rosses drop bid to buy S&L stock,' appeared three months later, on Tuesday, February 28, 1989. It contained only 18 paragraphs. It reported Ross had withdrawn his share-acquisition proposal. It reported the share price had dropped, dividend payments had stopped, and Santa Barbara S&L had lost money in 1988 and planned to make personnel and salary reductions. The article stated that '[a]s reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud. Investors who participated [in the Ross/Marlin syndicates] claim that they were defrauded, [the FBI, the Organized Crime Strike Force, and a federal grand jury] investigated both Ross and Marlin as a result of the allegations, and even though] Marlin had been convicted, Ross was never . . . charged with a crime or convicted of any wrongdoing.'"

e. *The major factual controversy at the second trial.*

Ross contended three statements in the articles, and an implication found in both articles, were defamatory. This contention was based upon Ross's assertion that although he had been investigated in 1972-1974 for violating the Hobbs

Act, he had never been investigated by federal agencies for the investor frauds that resulted in Marlin's incarceration, and that both articles falsely stated or implied to the contrary. The evidence focused on whether there were two separate investigations and which agencies were involved.

The following are the three statements and the implication:

Statement in the first article:

(1) [Taken from the sidebar chronology box]: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission."

Statements in the second article:

(2) "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

(3) "The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations."

The implication.

As to *both* articles, there was the implication that "Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison[.]"

f. *The special verdicts.*

(1) *Liability.*

After the liability phase of the trial, the jury rendered the following special verdicts:

(1) Ross had proven by a preponderance of the evidence that each of the three statements was false, defamatory, and negligently written by Sharp and McCumber. The News-Press had not proven by a preponderance of the evidence that the three statements were fair and true reports of one or more official government records or proceedings.

(2) Both articles implied that "Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison [.]" With regard to *both* articles, Ross had proven "by a preponderance of the evidence that [the News-Press] intended to convey the implication ...," which was false and defamatory, and which Sharp and McCumber negligently conveyed. With regard to both articles, the News-Press had not proven by a preponderance of the evidence that the implication was a "fair and true report of one or more official government records or proceedings[.]"

(2) *Damages.*

After the damages phase of the trial, the jury rendered the following special verdicts.

With regard to the first statement taken from the sidebar chronology, the jury found that Ross had *not* proven by a preponderance of the evidence that the statement caused Ross damage.

The jury found that Ross had proven by a preponderance of the evidence that the other two statements *and* the implication had caused Ross damage.

The jury awarded Ross $2 million for injury to his good name and reputation and $250,000 damages for injuries suffered for shame, mortification, injured feelings, and mental suffering.

ISSUES RAISED

The News-Press contends in its cross-appeal:

1. The law of the case does not preclude a reexamination of whether Ross is a limited public figure.

2. The articles were substantially true.

3. The absolute privilege of a fair and true report applies.

Ross contends in his appeal:

1. The trial court erred in granting the News-Press's motion for a directed verdict on the issue of malice.

2. A ruling by Judge Boland precluded Judge Kalin from considering an in limine motion with regard to special damages.

DISCUSSION

1. OUR CONCLUSION IN THE FIRST APPEAL THAT ROSS IS A PRIVATE PERSON AND NOT A LIMITED PUBLIC FIGURE IS LAW OF THE CASE.

The News-Press contends the law of the case doctrine does not preclude re- examination of the limited public figure issue. This contention is not persuasive.

a. *Additional facts.*

In 1991, prior to the first trial, Ross brought a motion for summary adjudication contending he was a "private person" and not a "limited public figure." The News-Press opposed the motion arguing Ross was a limited public figure. In support of its position, the News-Press pointed to documents reporting that Ross had applied to the California Department of Savings and Loan to increase his ownership interest in the Santa Barbara S&L. The trial court granted the motion, ruling Ross was a private person for purposes of this litigation. On appeal from the first verdict, the News-Press challenged the trial court's ruling.

In our first opinion, filed on March 24, 1997, we examined the legal question of Ross's status. *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 264, 79 Cal.Rptr.2d 178, 965 P.2d 696 [whether a plaintiff is a public figure is question of law for trial court; on appeal, trial court's resolution of disputed factual questions bearing on public figure determination reviewed for substantial evidence].) We delineated the facts, as presented by the parties, including Ross's personal background and his relationship with, and his attempt to purchase a greater interest in, the Santa Barbara S&L. We discussed facts relevant to whether Ross had injected himself into public forums, such as Ross had never given a press conference, never held or run for public office, and never given public speeches. We included in our recitation of the facts that Ross had "applied to the banking regulatory agencies for permission to increase his ownership share in the Santa Barbara S&L. . . ."

We upheld the trial court's ruling on the summary adjudication motion, and held that for purposes of this case, Ross was *not* a limited public figure. This holding was based upon the following factors. Any controversy was created by the News-Press. Ross had not engaged in conduct he "knew

would markedly elevate the chances he would become embroiled in a public controversy. . . . [H]is application with governmental agencies did not convert Ross into a limited public figure, or otherwise everyone who made such a request would lose their private person status. [¶] Additionally, Ross did not act to attract the media or to influence a public debate."

Before the first trial, Judge Schneider had ruled that the California Department of Savings and Loan application was not discoverable pursuant to Financial Code section 8009. After the first appellate opinion and prior to the second trial, there was a dispute as to whether Judge Schneider's ruling was binding. In March 2000, Ross was ordered to produce the entire application.

In the application, Ross revealed that he had a business relationship with Marlin from 1969 to 1971, and in the early 1970's "there had been an investigation of Mr. Ross by the United States Government (U.S. Attorney Office Strike Force Department, F.B.I., Grand Jury) . . . relating to allegations made by [Marlin] a former business associate. . . . Ross also revealed that approximately five years later, Marlin was indicted for activities that commenced around November 1973 and continued until 1976, and even though Marlin claimed the activities began in mid-1971 and that Ross was somehow involved, Ross was not named in the Marlin indictment. Ross further revealed that his description of these events was "very summary in nature" and other details could be provided, or, those persons in the federal agencies involved (including Nolan) could be contacted.

The second trial began in January 2001.

b. *The law of the case.*

The doctrine of law of the case precludes re-litigation of legal issues. When an issue of law has been decided by the

Court of Appeal or Supreme Court, that rule of law or principle is binding in subsequent proceedings in the lower court and upon subsequent appeal. (*People v. Stanley* (1995) 10 Cal.4th 764, 786-787, 42 Cal.Rptr.2d 543, 897 P.2d 481; *People v. Shuey* (1975) 13 Cal.3d 835, 841, 120 Cal.Rptr. 83, 533 P.2d 211; *Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212, 219 Cal.Rptr. 445, 707 P.2d 818.) "Application of the rule is now subject to the qualifications that 'the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision.' [Citations.]" (*People v. Shuey*, *supra*, at p. 842, 120 Cal.Rptr. 83, 533 P.2d 211; *Clemente v. State of California, supra*, at p. 212, 219 Cal.Rptr. 445, 707 P.2d 818.)

Although many circumstances may result in an unjust decision, "there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice. . . ." *People v. Shuey*, *supra*, 13 Cal.3d at p. 846, 120 Cal.Rptr. 83, 533 P.2d 211; *People v. Stanley*, *supra*, 10 Cal.4th at p. 787, 42 Cal.Rptr.2d 543, 897 P.2d 481.) A change in the law or a substantial change in the facts may provide reason to revisit an issue. (*Clemente v. State of California*, *supra*, 40 Cal.3d at p. 212, 219 Cal.Rptr. 445, 707 P.2d 818; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 685, 72 Cal.Rptr.2d 410, 952 P.2d 218.)

c. *Discussion.*

The News-Press argues that the contents of the California Department of Savings and Loan application were not known when we rendered our first opinion and the contents create a sufficient difference in the facts on a matter of great public concern that if we do not revisit the limited public figure issue a great injustice will result. The News-Press argues that in the application Ross distilled the facts, did not make a

distinction between the different investigations, and "[a]rmed with this disclosure, this Court now should find that [Ross's] 'status' did in fact 'invite public attention such that he relinquished his concerns about his name.'" This argument is unpersuasive.

As stated above, prior to rendering the first appellate decision, we had been made aware of, and considered, the filing of the application. We concluded that the effect of the application did not convert Ross into a public figure. This result is not altered because Ross's application statements about the two investigations are not precise. The News-Press has not demonstrated how this "new" information would have increased the public's attention as to Ross. The News-Press has not demonstrated that the *contents* of the application changed substantially the limited public figure discussion.[4]

Second, the News-Press has waived its right to suggest that the issue should be revisited. Before the first trial, in opposing the summary adjudication motion, the News-Press did not argue that the *contents* of the application were necessary before the limited public figure issue could be addressed. In March 2000, prior to the second trial, Ross was ordered to produce the entire

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[4] In addition to cases we discussed in the first appellate opinion, the News-Press relies heavily upon *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 285 Cal.Rptr. 430 to show the significance of an application to a governmental agency in a limited public figure discussion. However, *Mosesian* involved a situation very different from the one before us. The plaintiff was a limited public figure because he had become "deeply embroiled by his own efforts in a public controversy over his application and at every opportunity thrust[ ] himself into the center of the dispute to influence the decision makers as to the merits of the application. . . ." (*Id.* at p. 1701, 285 Cal.Rptr. 430; cf. *Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190, 31 Cal.Rptr.2d 193; compare *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6; *Girod v. El Dia, Inc.* (D. Puerto Rico 1987) 668 F.Supp. 82; *Trans World Accounts, Inc. v. Associated Press* (N.D.Cal.1977) 425 F. Supp. 814.)

application. The second trial did not begin until January 2001. At no time during this 10-month period of time, nor at any time during the lengthy second trial, did the News-Press suggest that the application's contents were relevant to the limited public figure issue or that the issue should be re-addressed. Rather, the News-Press's actions were consistent with a February 17, 2000, letter in which the News-Press specifically stated that it would not revisit the limited public figure issue.[5]

Third, adhering to the law of the case does not result in a substantial injustice. The News-Press suggests it is unfair to deny it the right to revisit the issue because it was foreclosed from looking at the application by Ross's refusal to release it. However, this argument misconstrues the procedural history of this case. Prior to the first trial, Judge Schneider ruled that the application was not discoverable pursuant to Financial Code section 8009. Prior to the second trial, there was a dispute as to whether Judge Schneider's ruling was binding. After a motion to compel, the document was produced. Thereafter, the News-Press had months before the second trial to raise the issue, yet it did not do so.

Lastly, the News-Press contends the law of the case should not apply because this case involves the First Amendment and a savings and loan, is a matter of important public concern, and pure issues of law may be reviewed for the first time on appeal. For this proposition, the News-Press relies heavily upon a decision of the Arizona Supreme Court,

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[5] The February 17, 2000, letter was submitted to this court by Ross in a supplemental appendices. The News-Press brought a motion to strike contending we could not consider the letter because it had not been presented to the trial court. We granted the motion to strike. At oral argument, the parties stipulated to the authenticity of the letter. In the interests of justice, on our own motion, we have taken this letter as evidence. (Code Civ. Proc., § 909; *Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1259, 279 Cal.Rptr. 249.)

Dombey v. Phoenix Newspapers, Inc. (Ariz.1986) 724 P.2d 562 [150 Ariz. 476].

In *Dombey*, the issue as to whether the plaintiff in a defamation lawsuit was a public figure was raised *sua sponte* by the Arizona Supreme Court. (*Dombey v. Phoenix Newspapers, Inc.*, *supra*, 724 P.2d at p. 568.) The Arizona Supreme Court concluded the issue had not been waived because it was of statewide importance and involved free speech issues of constitutional dimension. (*Id.* at pp. 567-569.) However, in its conclusion, *Dombey* stated that issues not properly raised by the parties would not be considered if they "have been intentionally and clearly waived by the parties. " (*Id.* at p. 569.) Here, the News-Press clearly waived the issue.

We agree with *Dombey* and the News-Press that issues of constitutional dimension deserve careful review and that some cases and issues are of public concern, beyond the battle between the parties. However, acceptance of the News-Press's argument would give free rein to news media defendants to unearth and bring forth new facts about a plaintiff's background regardless of the stage of the proceedings, and would enable the media defendant to revisit repeatedly a pivotal issue in every defamation case--the status of the plaintiff.

The law of the case has established that Ross is a private person for purposes of this case.

2. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S FINDINGS WITH REGARD TO SUBSTANTIAL TRUTH.

The News-Press contends the challenged statements and the implication are not actionable because they are substantially true. This contention is not persuasive.

a. *Applicable law.*

"The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations .] It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if [he or] she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citations.] ... Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517, 111 S.Ct. 2419, 115 L.Ed.2d 447; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 687, 29 Cal.Rptr.2d 547.)

Thus, defects on minor matters do not render an article defamatory if the substance is true. However, to be substantially true, the "proof of truth must go to the precise conduct or characteristic asserted." (Sack, Libel, Slander, and Related Problems (3d ed.2002) § 3.9, p. 3-23.) A statement is not substantially true if "the conduct alleged is substantially different from the conduct in which the plaintiff in fact engaged. [¶] Proof that a man or woman breached a fiduciary duty, for example, is not proof that he or she was a 'thief' or an 'embezzler.' Proof that the plaintiff is under administrative investigation does not establish the truth of the published allegation that he was under criminal investigation. And if a plaintiff was alleged to have committed a burglary, he or she need only prove that he or she did not burgle. It is no defense to the libel action to prove that the plaintiff committed a murder, although not surprisingly that fact may well have a

substantial effect on the damages to which the plaintiff is entitled." (*Id.* § 3.9, pp. 3-23--3-24, fns. omitted.)

The fact that some parts of an article are true, will not foreclose the plaintiff from recovery if any material part of the publication is false. (*Shumate v. Johnson Publishing Co.* (1956) 139 Cal.App.2d 121, 132, 293 P.2d 531.) Further, if a statement is literally accurate, but has a false implication, defamation may be proven. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 33, 81 Cal.Rptr. 360, 459 P.2d 912; *Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1131, 212 Cal.Rptr. 838.) The placement of facts in an article can result in a defamatory implication. (*Kapellas v. Kofman*, *supra*, at p. 33, 81 Cal.Rptr. 360, 459 P.2d 912.)

b. *Burden of review.*

At trial, plaintiffs have the burden to prove that a statement or implication is false. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 776, 106 S.Ct. 1558, 89 L.Ed.2d 783; *Lundell Mfg. v. American Broadcasting Companies* (8th Cir.1996) 98 F.3d 351, 357.) "In libel actions in which the questioned statement is susceptible to several interpretations, the initial function of the court is to determine whether the publication could reasonably have been understood to have a libelous meaning. It then becomes the jury's function to determine from the evidence which of the potential meanings was actually drawn by the readership. [Citations.]" (*Kapellas v. Kofman*, *supra*, 1 Cal.3d at p. 34, fn. 14, 81 Cal.Rptr. 360, 459 P.2d 912.) In making this inquiry, the publication is not evaluated under the microscope of persons "'trained in the law, but by the natural and probable effect upon the mind of the average reader.' [Citation.]" (*Morningstar, Inc. v. Superior Court*, *supra*, 23 Cal.App.4th at p. 688, 29 Cal.Rptr.2d 547.)

On appeal, we review the jury's conclusions as to falsity and substantial truth under the substantial evidence standard of review. (*Meloff v. new York Life Ins. Co.* (2d Cir.2001) 240 F.3d 138, 146 ["What better group of 'average listeners' than a panel of jurors, the proverbial jury of one's peers? As the standard of review requires us to credit the plaintiff with every possible inference a juror could draw...."]; *Smith v. Des Moines Public Schools* (8th Cir. 2001) 259 F.3d 942, 946-947.)[6]

c. *There is substantial evidence to support the jury's findings that the statements and the implication were false.*

Numerous witnesses testified that there were two, distinct, governmental investigations: (1) the 1972-1974

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[6] In our first appellate opinion, the News-Press contended the issue of substantial truth was an ultimate constitutional question of law demanding an independent review. We assumed, but did not decide, that an independent review was required. We were unable to reach a conclusion on the issue because the first jury's verdicts were inconsistent and there were controverted facts regarding the two federal investigations.

Prior to the start of the second trial, when Judge Kalin was ruling on in limine motions, the News-Press conceded that the substantial truth issue was for the jury to decide. In this appeal, the News-Press argues that we may decide the issue as a matter of law because the facts presented by SEC attorney Green and those found by us in the first opinion, result in a record of undisputed evidence. (*Lundell Mfg. v. American Broadcasting Companies, supra*, 98 F.3d at pp. 355-359 [when underlying facts as to gist and sting of defamatory charge are undisputed, court may determine substantial truth as matter of law, otherwise sufficiency of evidence analysis applies in case brought by private plaintiff against media defendant]).

Given the depth and breadth of the dispute contained in this voluminous record, the numerous factual battles, the conflicting inferences that can be drawn from many facts, and the ambiguity, significance, effect, and substance of Green's testimony, we cannot state that the facts are undisputed.

investigation of Ross for violating the Hobbs Act; and (2) the 1976 investigation of Marlin for investor fraud.

Twitty, special attorney with the Department of Justice's organized crime section and the strike force, FBI special agent Hill, and Richard Patrick Crane (Crane), an attorney with the Department of Justice assigned to the strike force, were involved in the 1972-1974 investigation of Ross for violating the Hobbs Act. All testified unequivocally that the 1972-1974 investigation was aimed solely at Marlin's accusations that in 1971 Ross had committed extortion, kidnapping, and pistol-whipping relating to the transfer of business interests. These witnesses all testified that the investigation *never* involved accusations of investor fraud. They all testified that Ross was the target and subject of the 1972-1974 inquiry and that neither the SEC, the IRS, nor the Post Office were involved.

The 1976 investigation was begun at the SEC. SEC attorney Green led the inquiry. Green testified that when inquiries began, all facts were marshalled to learn who was involved and what happened, when. Green testified that Ross's name arose and Ross was looked at because Ross had been Marlin's partner. Further, when sworn testimony was taken, Ross and others were asked about Ross's relationship with Marlin. Green explained that the SEC obtained records from Property Acquisition and Development, an entity that had been jointly owned by Marlin and Ross. The SEC never requested documents from Ross. Ross's name was not on the SEC's formal notice of inquiry, nor was it on a list of individuals Green considered suspects.

Thereafter, the case was shifted from the SEC to the United States Attorney's Office for a criminal probe. The case was first handled by Assistant United States Attorney Terry W. Bird, and thereafter, by Assistant United States Attorney Nolan. Nolan was assisted primarily by Postal Inspector

Almond. Nolan and Almond, unequivocally testified that neither they nor any of the other agencies involved, investigated Ross for the investor frauds that sent Marlin to prison. The target and subject of the inquiry was Marlin. Ross's records were not subpoenaed and he was not called before the grand jury. Ross's name was mentioned in the investigation because he had been associated with Marlin and also because Marlin had raised Ross's name in defense. In 1977, a multi-count indictment was filed against Marlin. It related solely to activities commencing in 1973, after Ross and Marlin's relationship had been severed, and ending in 1976.

We agree with the News-Press that had the articles simply mislabeled the investigative agencies, the false statements would not have been actionable, as the difference would been minor and would not have had a different effect on the average reader.

However, the articles did more than confuse the governmental entities. The challenged statements and implication made other errors that were not slight nor minor errors in detail. There was a substantial difference in the truth. The articles wrongly stated or implied that Ross had been investigated by enforcement agencies for the same investor frauds for which Marlin was incarcerated.

As shown by the jury's special verdicts, the jury necessarily found that Ross was *not* investigated by federal agencies for the investor frauds for which Marlin was imprisoned. There were two separate, distinct, and noncontinuance inquiries relating to two separate, distinct, and noncontinuance events. Ross was the subject of the first investigation. This investigation related to activities in 1971 and had nothing to do with accusations of investor frauds. Marlin was the subject of the second investigation, which was for investor frauds that occurred after Ross had severed his relationship with Marlin. The fact that Ross's name arose

when the circumstances surrounding Marlin's criminal activities were examined in 1976, did not indicate that Ross was also investigated at that time. The 1976 investigation led to Marlin's incarceration. The jury reasonably concluded that in the mind of the average reader, it was substantially worse for Ross to be linked to a governmental, criminal investigation for investor fraud that led to Marlin's incarceration, than linked to a prior investigation that did not lead to any charges being filed against Ross, particularly when the prior investigation was based on allegations made by Marlin, now a convicted felon and Ross's ex-partner.

The News-Press argues that the above analysis is too narrow as it limits the term "'investigate'" to one who was the "'subject'" or "'target'" of the governmental inquiry even though "[n]o average reader would parse language this way." The News-Press points to dictionary definitions of "investigate" which are to trace, search, examine, and inquire. The News-Press then argues Ross was "investigated" because inquiries were made about him.[7] (*Cf. Simonson v. United Press Intern., Inc.* (7th Cir. 1981) 654 F.2d 478, 481-482.)

This argument was rejected by the jury. It was reasonable for the jury to conclude that to an average reader, when a governmental agency "investigated" it did so because that agency had some basis to believe that the person was culpable. The agency's resources were used to determine if that belief was supportable. Since the facts and circumstances surrounding accusations were to be examined, others involved in the scenario would always be discussed in the process. It was reasonable for the jury to conclude that such background inquiries did not mean that everyone involved or mentioned

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[7] The trial court took judicial notice of the dictionary definitions of "investigate" found in three dictionaries.

had been "investigated," as they were not the "target" or "subject" of the inquiry.[8]

The News-Press also contends the gist and sting of the articles was true, arguing as follows: Ross was investigated by federal law enforcement agencies in the 1970's for serious crimes in connection with his business dealings with Marlin, but no charges were brought against him. "[A]verage Santa Barbara readers would not have seen a significant difference between the newspaper's report that plaintiff was investigated for alleged white collar financial crimes and thuggery between 1972-1976 and the documents' report that plaintiff was investigated for alleged white collar financial crimes and thuggery in 1972-1974. These average readers would conclude ... that the 'distinction between the U.S. Attorney's Office and the Strike Force would be of little significance.'"

The News-Press's argument suggests an average reader would equate the 1972-1974 investigation precipitated by Marlin's accusations *against Ross*, with the investigation begun two years later *against Marlin*, for totally different activities. However, while the events had many of the same players, it was reasonable for the jury to conclude that the accusations underlying each investigation were dissimilar.[9] The

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[8] On appeal, the News-Press contends, as a matter or law, that the implication was not false. The foundation for this contention is that the articles expressly noted that Ross had denied being involved in Marlin's swindle, Ross maintained his innocence of any wrongdoing that sent Marlin to prison, Ross stated he had not been mentioned in the Marlin indictment, and Ross stated he only knew about the investment swindle from newspaper articles. These statements attributed to Ross do not, as a matter of law, destroy the reasonably inferable conclusion that the content of the articles were manipulated to create the false implication. *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803-807, 163 Cal.Rptr. 628, 608 P.2d 716 [discussing implications].)

[9] To the extent the News-Press's argument can be construed as an incremental harm argument, it is not persuasive. The News-Press cites no California cases applying the incremental harm doctrine in California. The

juxtaposition of the words in the articles continually connect Ross to Marlin's criminal frauds.

There is substantial evidence to support the jury's findings that the challenged statements and the implication were not substantially true.

3. THE TRIAL COURT DID NOT ERR IN DENYING THE NEWS-PRESS'S MOTION FOR SUMMARY ADJUDICATION BASED UPON THE FAIR AND TRUE REPORT PRIVILEGE.

The News-Press contends the trial court erred in denying its motion for summary adjudication based upon the fair and true report privilege. This argument is unpersuasive.[10]

Ninth Circuit has stated that this doctrine is fundamentally flawed and "not an element of California libel law." (*Masson v. New Yorker Magazine, Inc.* (9th Cir.1992) 960 F.2d 896, 899, on remand from the Supreme Court, *Masson v. New Yorker Magazine, Inc., supra*, 501 U.S. 496, 111 S.Ct. 2419, 115 L. Ed. 2d 447.)

[10] The News-Press phrases this issue in terms of an error by the trial court in denying its motion for summary adjudication. An order denying a motion for summary judgment (or for summary adjudication) is not an appealable order. (Code Civ. Proc., §§ 904.1, 906; *cf. Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 412, 87 Cal.Rptr.2d 453, 981 P.2d 79 (conc. & dis. opn. of Kennard, J.).) There is authority supporting the proposition that such orders are reviewable from final judgments. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 753, 159 Cal.Rptr. 693, 602 P.2d 393 [not addressing the substantive issue but stating "An order denying partial summary judgment is a nonappealable order although reviewable on appeal from the final judgment."]; *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1425, 97 Cal.Rptr.2d 752; compare *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 16 Cal.Rptr.2d 38 and *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 907-908, 85 Cal.Rptr.2d 301, with *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256, 75 Cal.Rptr.2d 681 [reviewable only upon writ].) However, some authority states that a denial of a summary judgment motion should be addressed only when the party raising the issue can show prejudice. (E.g., *Waller v. TJD, Inc., supra.*)

a. *Additional facts.*

The News-Press brought a motion for summary adjudication alleging it could not be liable because the articles were privileged as fair and true reports of public proceedings. (Civ.Code, § 47, subd. (d).) On June 1, 1999, Judge Boland denied the motion.

Upon special verdicts, with regard to each of the three statements and with regard to the implication, the jury found that the News-Press had *not* proven by a preponderance of the evidence that the statements or the implication were fair and true reports of one or more official government records or proceedings.

b. *The fair and true reports privilege.*

Civil Code section 47, subdivision (d) creates an absolute privilege for fair and true reports of official proceedings, including remarks and statements made in the scope of judicial, legislative, or other public official proceedings. (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 242-243, 83 Cal.Rptr.2d 677; *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 976-977, 234 Cal.Rptr. 702.) The parties concede this includes coverage of Department of Justice reports, FBI reports, grand jury testimony, and civil lawsuits.

"The rationale for the privilege is of considerable vintage, but remains as relevant as ever: The reporter is a surrogate for the public, permitting it to observe through the reporter's eyes how the business of government is being conducted." (Smolla, Law of Defamation, *supra*, § 8:67, p. 8-44.3, fn. omitted.) "Most official proceedings must be

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For purposes of this appeal, we assume the News-Press may raise the issue of the fair and true reporting privilege.

condensed and summarized in reports about them to the general public, and perfect accuracy in recounting the proceedings is not required." (*Id.* at § 8:76, p. 8-57.) The press is permitted flexibility in the choice of words and need not quote the source material verbatim, as long as the language used is substantially in accord with the source material. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 262, fn. 13, 208 Cal.Rptr. 137, 690 P.2d 610; *Jennings v. Telegram-Tribune Co.* (1985) 164 Cal.App.3d 119, 125, 210 Cal.Rptr. 485.)

Publications are absolutely privileged as long as they capture the gist or sting of the official reports from which they obtained information, as measured by the probable affect of the average reader. (Civ. Code, § 47, subd. (d); *Kilgore v. Younger* (1982) 30 Cal.3d 770, 777, 180 Cal.Rptr. 657, 640 P.2d 793.)[11] The question is whether the report fairly reflects the official proceedings, not whether the report is fair to the plaintiff in the sense of providing the plaintiff's version of the events or resolving the merits of the charges. (*Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 427, 172 Cal.Rptr. 49

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[11] Numerous cases have found the absolute privilege applicable. (E.g., *Kilgore v. Younger, supra*, 30 Cal.3d 770, 180 Cal.Rptr. 657, 640 P.2d 793 [article fairly connected plaintiff to organized crime]; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1050, fn. 6, 61 Cal.Rptr.2d 58 [article stated district attorney had opened criminal probe of plaintiff and obtained search warrant; actually, state auditor had requested warrant]; *Handelsman v. San Francisco Chronicle* (1970) 11 Cal.App.3d 381, 90 Cal.Rptr. 188 [civil complaint for conversion reported as accusations of theft]; *Crane v. The Arizona Republic* (9th Cir.1992) 972 F.2d 1511, 1520-1521 [confusing the United States Attorney's Office with the Organized Crime Strike Force]; *Jennings v. Telegram-Tribune Co., supra*, 164 Cal.App.3d 119, 210 Cal.Rptr. 485 [article reported plaintiff had been convicted of tax fraud and tax evasion when he had pled guilty to knowingly failing to file tax returns]; *Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal.App.2d 255, 71 Cal.Rptr. 295 [article stated plaintiff previously sentenced to prison for a check charge, when plaintiff had been sent to reformatory].)

(overruled on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738, 257 Cal.Rptr. 708, 771 P.2d 406).) However, the reporter may not pick and choose parts of the source material. True statements cannot be juxtaposed, garbled, or fragmented such that they create false impressions. (*Crane v. The Arizona Republic*, *supra*, 972 F.2d at pp. 1522-1523; *Dameron v. Washington Magazine, Inc.* (D.C.Cir. 1985) 779 F.2d 736, 739.)

"The privilege is similarly unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. It must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings." *Dameron v. Washington Magazine, Inc.*, *supra*, 779 F.2d at p. 739; *Ditton v. Legal Times* (E.D. Va. 1996) 947 F. Supp. 227, 230.)

In California, if the reporter presents a fair and true summary of the official records and proceedings, the privilege applies regardless of whether the article or communication was made with common law malice. (*Howard v. Oakland Tribune* (1988) 199 Cal.App.3d 1124, 1128, 245 Cal.Rptr. 449; *Green v. Cortez* (1984) 151 Cal.App.3d 1068, 1074, 199 Cal.Rptr. 221.)

c. *Burden of review.*

Summary judgments must be granted when there are no disputed issues of fact. If different inferences can reasonably be deduced from the evidence, summary judgment is not appropriate. (Code Civ. Proc., § 437c, subd. (c).)

California cases have decided the fair and true issue as a matter of law when no reasonable minds could differ on the

issue. Thus, summary judgments, demurrers, and nonsuits have been affirmed in favor of media defendants. (*Kilgore v. Younger*, *supra*, 30 Cal.3d 770, 180 Cal.Rptr. 657, 640 P.2d 793 [demurrer]; *Howard v. Oakland Tribune*, *supra*, 199 Cal.App.3d 1124, 245 Cal.Rptr. 449 [summary judgment]; *Jennings v. Telegram-Tribune Co.*, *supra*, 164 Cal.App.3d 119, 210 Cal.Rptr. 485 [nonsuit]; *McClatchy Newspapers, Inc. v. Superior Court*, *supra*, 189 Cal.App.3d 961, 234 Cal.Rptr. 702 [writ granted directing entry of summary judgment]; *Green v. Cortez*, *supra*, 151 Cal.App.3d 1068, 199 Cal.Rptr. 221 [demurrer]; *Hayward v. Watsonville Register-Pajaronian and Sun*, *supra*, 265 Cal.App.2d 255, 71 Cal.Rptr. 295 [summary judgment]; *Dorsey v. National Enquirer, Inc.* (9th Cir. 1992) 973 F.2d 1431 [affirming summary judgment in favor of Enquirer; no dispute about what occurred in the judicial proceedings and the reasonable inferences all led to the same conclusion]; cf. *Braun v. Chronicle Publishing Co.*, *supra*, 52 Cal.App.4th at pp. 1049-1052 [SLAPP motion].)

When reasonable minds can differ as to whether the report was fair and true, summary judgment is denied and the issue is properly sent to the jury, which decides the issue. (*Handelsman v. San Francisco Chronicle*, *supra*, 11 Cal.App.3d at p. 386, 90 Cal.Rptr. 188 [proper to let jury decide effect produced by the words on the reader and if item was fair]; *Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1634, 263 Cal.Rptr. 410 [reversing summary judgment "[w]here, as here, reasonable minds could disagree on what is fair, the issue is a question of fact to be determined by the jury."]; *Rollenhagan v. City of Orange*, *supra*, 116 Cal.App.3d at p. 428, 172 Cal.Rptr. 49 [where there is any evidence of lack of fair report, correct procedure is to present issue to jury]; *Crane v. The Arizona Republic*, *supra*, 972 F.2d at pp. 1522-1523 [reasonable jury could conclude effect of the juxtaposed denials materially altered gist and sting]; cf. *Green v. Cortez*, *supra*, 151 Cal.App.3d at p. 1073, 199 Cal.Rptr. 221 [fair and true ordinarily question of fact, but resolved on

demurrer when plaintiff stipulated he could not allege inaccurate reporting]; compare with *McClatchy Newspapers, Inc. v. Superior Court*, *supra*, 189 Cal.App.3d at p. 976, 234 Cal.Rptr. 702 [stating *Handelsman's* discussion was dicta].)

d. *There is substantial evidence to support the jury's finding that the articles were not fair and true reports.*

The News-Press contends that the statements in the articles, as well as the implication, found their genesis in items that Sharp fairly reported. The News-Press argues that even if there were inaccuracies, it was absolutely privileged to publish the articles because to the average reader, the gist and sting of the articles was that Ross "was investigated [for serious crimes] by federal agencies, that the investigations focused on his dealings with his former partner Marlin, and that the investigation included fraud and extortion allegations."

During Sharp's three-month inquiry into Ross's background, she discovered and reviewed the 1973 FBI report emanating from the 1972-1974 investigation, Ross's grand jury testimony taken in 1973, other grand jury testimony elicited by SEC attorney Twitty, as well as the *Goodrich* complaint.

The FBI report included information about Ross and Marlin's relationship and their investments, as this was the background for Marlin's accusations. When Ross appeared before the grand jury in 1973, he invoked his Fifth Amendment privilege when asked about these investments. In the *Goodrich* complaint, there were accusations that investors were defrauded by both Ross and Marlin, from January 1969 through February 1976.

The News-Press cannot state that the challenged statements and implication fairly reported the FBI report and grand jury testimony as these documents were prepared years before the 1976 investigation of Marlin. Further, the

statements about Ross in these items can reasonably be described as background information. The 1973 FBI report designated Ross as the potential criminal, and Marlin as the victim. The 1972-1974 investigation was not directed at charges of investor fraud. Neither Ross nor Marlin were investigated at that time for investor fraud. It was reasonable for the jury to conclude that the gist and sting of the articles was that due to a fraud investigation of both Ross and Marlin, Ross's former partner went to jail, while Ross, did not. Thus, it was reasonable for the jury to conclude that the articles were not truthful, as they reported an investigation that never occurred.

The News-Press also argues that the articles fairly reported the contents of the *Goodrich* complaint. However, this civil lawsuit did not involve a criminal investigation, nor did it result in anyone's incarceration.

Even if the fair and true report privilege permits flexibility and literary license, neither the FBI report, grand jury transcripts, nor the *Goodrich* complaint stated that Ross was investigated by governmental agencies for the investor crimes that sent Marlin to prison. The jury reasonably concluded that the articles were not fair nor true because they intertwined two, distinct, federal investigations. The jury reasonably concluded that the articles were not fair abridgements as they suggested Ross was a target of the 1976 inquiry that eventually led to the incarceration of Marlin.

Additionally, the jury could reasonably have concluded that the articles were not fair because while they were supposed to profile Ross, they unduly focused on Marlin and his criminal activities. The articles are replete with references to Marlin and Marlin's eventual incarceration. Only after drawing the false implication, does the first article address the 1972-1974 Hobbs Act investigation, which provides the basis for the

News-Press's fair and true argument. The second article never specifically mentions the Hobbs Act investigation.

We acknowledge that different inferences could be drawn from the facts. The FBI report contained statements of unlawful activity by Ross and Marlin, including allegations of diverting money from investors. Questions posed to Ross in the 1973 grand jury pertained to his investments with Marlin. The civil investor lawsuit targeted both Ross and Marlin for activities beginning in 1969. Other statements in the documents also can be excised to support the News-Press's position. However, it was not unreasonable for the jury to conclude that the News-Press's characterization of the proceedings unfairly dissected the data, pulled out bits and pieces, did not evaluate the statements in context, and inaccurately summarized the proceedings. It was not unreasonable for the jury to conclude that the articles were unfair because the information contained therein was garbled, leaving the readers with a false impression.

Additionally, to be a fair attribution, articles must indicate that the reported information came from an official source. (*Dameron v. Washington Magazine, Inc.*, *supra*, 779 F.2d at p. 739; *Ditton v. Legal Times*, *supra*, 947 F. Supp. at p. 230.) The first article might satisfy this mandate as it stated that documents had been reviewed. However, the second article contains no attribution. There is no statement in the second article that the information reported therein came from official sources. There is no language in the second article from which it reasonably can be understood that the article is based upon official sources. (Cf. *Medico v. Time, Inc.* (3d Cir. 1981) 643 F.2d 134, 139, fn. 17.)

The trial court did not err in denying the motion for summary adjudication and there is substantial evidence to support the jury's findings with regard to the fair and true report privilege.

4. THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT IN FAVOR OF THE NEWS- PRESS ON THE ISSUE OF ACTUAL MALICE.

Ross contends the trial court erred in directing a verdict for the News-Press with regard to the issue of actual malice. This contention is not persuasive.

a. *Actual malice.*

In defamation lawsuits, the status of the plaintiff is a pivotal issue as it delineates the plaintiff's burden of proof. If the plaintiff is a private figure, the states are free to define the standards of liability, provided it is not imposed without fault. (*Khawar v. Globe Internat., Inc., supra*, 19 Cal.4th at pp. 273-274, 79 Cal.Rptr.2d 178, 965 P.2d 696; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789.) California "has adopted a negligence standard for private figure plaintiffs seeking compensatory damages in defamation actions. [Citation.]" (*Khawar v. Globe Internat., Inc., supra*, at p. 274, 79 Cal.Rptr.2d 178, 965 P.2d 696.)

With regard to punitive damages, however, "even a private figure plaintiff must prove actual malice if the defamatory statement involves matter of public concern. [Citations.]" (*Khawar v. Globe Internal., Inc., supra*, 19 Cal.4th at p. 274, 79 Cal.Rptr.2d 178, 965 P.2d 696; *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 349.)

A defamatory statement is made with "actual malice" when it was made "'with knowledge that it was false or with reckless disregard of whether it was false or not.' (*New York Times Co. v. Sullivan* [(1964)] 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686....)" (*Khawar v. Globe Internal., Inc., supra*, 19 Cal.4th at p. 275, 79 Cal.Rptr.2d 178, 965 P.2d 696.) "[T]he publisher of a defamatory statement acts with reckless disregard amounting to actual malice if, at the time of

publication, the publisher 'in fact entertained serious doubts as to the truth of his publication.' (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262....)" (*Khawar v. Globe Internat., Inc.*, *supra*, at p. 262, 79 Cal.Rptr.2d 178, 965 P.2d 696.) It must be shown "'that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' (*Bose Corp. v. Consumers Union of U.S., Inc.* [(1984)] 466 U.S. 485, 511, fn. 30, 104 S.Ct. 1949, 80 L.Ed.2d 502 . . .; *see also*, *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711. . . .)" (*Khawar v. Globe Internat., Inc.*, *supra*, at p. 275, 79 Cal.Rptr.2d 178, 965 P.2d 696; *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 ["there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'"].)

Because a defendant's protestations of a good faith belief in the truth of the published statements do not insulate the defendant from liability *(St. Amant v. Thompson*, *supra*, 390 U.S. at p. 732), objective evidence and circumstantial facts shedding light on the defendant's mental state are vital. "The actual-malice inquiry looks at circumstantial evidence of what the journalists knew rather than at circumstantial evidence of what turned out to be correct." (*Newton v. National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 683- 684, fn. 42.)

Circumstances giving rise to serious doubt include, if a story is fabricated, if a story is based wholly upon unverified sources, if there are obvious reasons to doubt a source, or if the publisher's explanation of the errors is inherently improbable. *St. Amant v. Thompson*, *supra*, 390 U.S. at p. 732; *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 258, 208 Cal.Rptr. 137, 690 P.2d 610.)

Neither negligence, extreme negligence, choice of language, editorial decisions, unknowingly misleading the public, investigative failures, nor lack of objectivity, by themselves, are sufficient to prove actual malice. Even extreme departures from journalistic standards are insufficient to meet the high burden. (*Harte-Hanks Communications v. Connaughton*, *supra*, 491 U.S. at p. 688; *McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 860, 231 Cal.Rptr. 518, 727 P.2d 711; *Eastwood v. National Enquirer, Inc.* (9th Cir.1997) 123 F.3d 1249, 1251, 1256.)

Actual malice must not be confused with the concept of common law malice. The two concepts are very different. Common law malice is usually expressed as an "evil intent or a motive arising from spite or ill will." (*Masson v. New Yorker Magazine, Inc.*, *supra*, 501 U.S. at p. 510.) The actual malice standard "'directs attention to the "defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff."' [Citation.]" (*McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 872, 231 Cal.Rptr. 518, 727 P.2d 711.)[12]

b. *Standard of review.*

Ross concedes that actual malice must be proven by clear and convincing evidence. This is a heavy burden, "far in excess of the preponderance sufficient for most civil litigation." (*Eastwood v. National Enquirer, Inc.*, *supra*, 123 F.3d at p. 1252, fn. omitted.) It requires "convincing clarity." (*Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at p. 511; *Newton v. National Broadcasting Co., Inc.*, *supra*, 930 F.2d at p. 669.) The evidence must "'be such as to command the unhesitating assent of every reasonable mind.

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[12] To avoid confusing these terms, courts often refer to actual malice as constitutional malice. (*E.g.*, *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1258, fn. 1, 34 Cal.Rptr.2d 188.)

[Citation.]'" (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274, 105 Cal.Rptr.2d 674.)

With regard to actual malice, in ruling on a motion for a directed verdict, as when ruling on a motion for summary judgment, the heightened evidentiary burden applies. (*Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 252, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202.) Trial courts examine whether the plaintiff's evidence would "allow a rational finder of fact to find actual malice by clear and convincing evidence." (*Id.* at p. 254.)

On review from the granting of a directed verdict on the issue of actual malice, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. [Citation.]" (*Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. at p. 255; *Edwards v. Hall* (1991) 234 Cal.App.3d 886, 900-901, 285 Cal.Rptr. 810.)[13]

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[13] After a jury verdict, a reviewing court conducts an independent review as enunciated in *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, and *Harte-Hanks Communications v. Connaughton, supra*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562. Ross seems to concede that this case involves a matter of public concern. Except when discussing what should occur if we were to order a retrial, the News-Press has not raised any issues with regard to Ross's obligation to prove malice as defined under state law. (Civ.Code, § 48a, subd. (4)(d).)

c. *Discussion.*[14]

Focusing on the News-Press's "attitude, or state of mind, toward the allegedly libelous material published[.] [Citations.]" (*McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 847, 231 Cal.Rptr. 518, 727 P.2d 711), our task is to determine if a reasonable trier of fact could have found there was clear and convincing evidence that the News-Press acted with actual malice. We affirm the trial court's ruling if correct on any basis. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32, 51 Cal.Rptr.2d 444, 913 P.2d 473.)

(1) *There was no clear and convincing evidence of actual malice.*

Ross first contends that actual malice was shown as a matter of law. This contention is not persuasive.

Ross argues as follows. The jury found that the News-Press intended to convey the false and defamatory implication. Sharp and McCumber admitted they knew the defamatory implication was not true.[15] Earlier drafts of the first article

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[14] The discussion in Ross's opening brief raising the actual malice issue is limited to the implication. Ross does not argue that the News-Press acted with actual malice in publishing the three challenged statements. Thus, the News-Press contends Ross has waived the right to address actual malice with regard to the three challenged statements. In his reply brief, Ross contends his actual malice argument also applies to the three challenged statements, and that in any event, the challenged statements and the implication are the same.

Ross's concession and our conclusion that the trial court did not err in granting the summary judgment make it unnecessary for us to address the News-Press's waiver argument.

[15] Ross points to the following excerpts from the trial testimony:

During the examination of Sharp by Ross's attorney, the following occurred: "Q. Didn't you understand Mr. Nolan to tell you that he had conducted an investigation of Mr. Ross and Mr. Marlin for the frauds that sent Mr. Marlin to prison? [¶] A. Not exactly, No."

contained explicit statements that Ross was investigated for the same frauds as those that sent Marlin to jail, but these explicit statements were deleted by Sharp and are not found in the final article. Thus, the News-Press knew that the omitted statements were false, but intended to convey the same impression by implication.[16]

First, the jury's finding that the News-Press intended to convey the false implication was based upon a preponderance of the evidence standard, not the more elevated clear and convincing standard required to find actual malice. Additionally, even if Sharp intended to imply that Ross was investigated for the same frauds as Marlin, this would not demonstrate actual malice. It must be shown that Sharp knew the implication was false, or entertained serious doubts about its truth.[17]

In the examination of McCumber by Ross's attorney, the following occurred: "Q. Can you explain to the jury why, if Miss Sharp and you believed that, based upon what Mr. Nolan had said in October or November, well after a month after the draft I am reading from, that Mr. Ross had been investigated for the frauds that sent Mr. Marlin to prison, the sentence I read was pulled [from] the final article? [¶] A. We didn't necessarily believe he was investigated for the specific acts that sent Marlin to prison. . . ."

A short time later, McCumber testified as follows: "Q. Wasn't your understanding based on what Miss Sharp told you based on her conversation with Mr. Nolan that he allegedly had said that he had investigated Mr. Ross for the Marlin frauds? [¶] A. It was my understanding -- no, not precisely."

[16] The News-Press points to statements in the September 17, 1988 and September 27, 1988 drafts.

[17] Citing *Newton v. National Broadcasting Co., Inc., supra*, 930 F.2d at page 681 and *Howard v. Antilla* (1st Cir. 2002) 294 F.3d 244 at page 252, the News-Press argues that with regard to implications, to show actual malice, publishers must have intended to convey the defamatory impression, and even if an implication is clear and inescapable to the fact finder, it cannot be said that the journalist intended to leave that impression where the testimony shows the journalists had no such intention.

Second, deleting information from the earlier drafts does not necessarily indicate actual malice as it has little probative value on the writer's subjective state of mind. Deleting words to be more "understated and cautious cannot possibly be grounds for actual malice." (*Newton v. National Broadcasting Co., Inc., supra*, 930 F.3d at p. 685; *Foodscience Corp. v. McGraw-Hill Inc.* (D.Vt. 1984) 592 F. Supp. 362, 366.)

Third, it is a mischaracterization of the record to conclude that the excerpts quoted in footnote number 15 showed that Sharp and McCumber *admitted* they *knew* the implication was false. These excerpts are neither clear nor unambiguous. When viewed in context, this testimony cannot be construed as admissions. Sharp and McCumber repeatedly testified that they believed Nolan had failed to indict Ross because there was insufficient evidence to do so. They believed Ross was investigated for fraudulent activities dealing with investors. Even if Sharp and McCumber did not know the exact parameters of that investigation, this showed a lack of knowledge rather than a subjective awareness of falsity.

Additionally, Sharp and McCumber had evidence from other witnesses and from documents suggesting Ross was part of the 1976 investigation. The import of the testimony was that neither Sharp nor McCumber *knew* the contents of the implication was false. (*Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. at p. 513 [reporter's word choice, even if reflecting a misconception insufficient to show actual malice]; *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 951, 52 Cal.Rptr.2d 357.)

Ross relies upon Nolan's testimony to support his position that Sharp and McCumber knew he had not been investigated for Marlin's frauds. Ross suggests Nolan's testimony proves Sharp lied because she wrote in the first article that "'Tom Nolan, the assistant U.S. attorney who

prosecuted Marlin, said there was insufficient evidence to prosecute Ross.'" Ross suggests this was a lie because Nolan testified he never made this statement to Sharp, and he testified that he only had two conversations with Sharp, not three as Sharp testified.[18]

This is the strongest evidence in favor of Ross's position. However, this evidence does not rise to the level of sufficient clarity to show that Sharp and McCumber acted with actual malice. At the most, it demonstrates that Sharp had conflicting information about whether Ross was part of the 1976 investigation and to what extent. Sharp's explanation of the events was not inherently improbable. It was supported by her written notes and reasonable explanations of the evidence.

Actual malice was not shown as a matter of law.

(2) *There was insufficient cumulative evidence to demonstrate actual malice.*

Ross contends the facts cumulatively demonstrate that the News-Press acted with actual malice. (Cf. *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 257, 208 Cal.Rptr. 137, 690 P.2d 610.) This contention is not persuasive.

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[18] In part of his testimony, Nolan denied making the statement attributed to him by Sharp in the first article as it pertained to the 1976 investigation. However, Nolan acknowledged that when he talked to Sharp, he might have used the term "insufficient evidence" when referring to the 1972-1974 investigation and when referring to a chart in his office that contained Ross's name. Further, Nolan testified in his deposition that he probably used that phrase because prosecutors do so when declining a case or when talking to newspaper reporters. Nolan also acknowledged that Sharp was confused about the two different investigations and that he spent considerable time explaining to her Marlin's defense, which included allegations about Ross.

Ross suggests the investigation was inadequate because Sharp did not access a number of documents, did not contact a number of available witnesses, did not ask Ross if he had been investigated for fraud, and did not do additional research after receiving the retraction requests. Ross also argues Sharp ignored contrary evidence. As examples of Sharp's purported failures, Ross notes that Sharp did not review the 1977 Marlin indictment, and did not contact Twitty, Almond, or Terry Bird (the United States Attorney who originally handled the Marlin investigation).

However, investigative failures do not necessarily prove actual malice. (*St. Amant v. Thompson*, *supra*, 390 U.S. at p. 733; *McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 860, 231 Cal.Rptr. 518, 727 P.2d 711.) Sharp investigated for more than three months. She examined piles of documents, including the *Goodrich* complaint and the 1973 grand jury testimony in which Ross was questioned. She talked to numerous witnesses, including Nolan and Richard Noble (the attorney who represented the investors in the *Goodrich* case). The evidence did not show that Sharp believed her sources were unreliable or that Sharp entertained serious doubts about their reliability. (*Reader's Digest Assn. v. Superior Court, supra*, 37 Cal.3d at pp. 258-259, 208 Cal.Rptr. 137, 690 P.2d 610 [investigative failures do not constitute actual malice; crucial issue is whether the defendant believed in reliability of sources].) Further, the News-Press was not obligated to contact Ross, ask him specific questions, or believe his denials in the face of conflicting evidence. (*Eastwood v. National Enquirer, Inc.*, *supra*, 123 F.3d at p. 1254, fn. 10; *D.A.R.E. America v. Rolling Stone Magazine* (C.D. Cal. 2000) 101 F. Supp.2d 1270, 1284, fn. 3.)

The first retraction demand simply repeated Ross's general denials, which had been reported in the first article. The second retraction demand has no bearing on actual malice as it was sent after the two articles were published.

Ross further contends actual malice was shown because Sharp relied upon biased sources. For example, Ross notes that Sharp relied upon persons who had opposed Ross in civil litigation, including a lawyer for the investors who was Sharp's confidential source, Stephen Holohan. However, a reporter may rely upon biased sources as long as the reporter believes them to be credible. (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at pp. 258-259, 208 Cal.Rptr. 137, 690 P.2d 610.) Sharp's sources had valuable information which she used as a springboard for further inquiry.[19]

Ross suggests Sharp deliberately altered Ross's words by stating that Ross said he "formally" severed his relationship with Marlin in 1971. This was not an unreasonable statement, given the information known to Sharp.

Relying upon the testimony of his expert, Sherrie Mazingo, Ross contends Sharp's deviations from journalistic standards constitutes actual malice. However, even extreme departures from journalistic standards, by themselves, do not show actual malice, as the focus is on the reporter's mental state with regard to truth and falsity. (*Harte-Hanks Communications v. Connaughton*, *supra*, 491 U.S. at p. 665.)

Ross also contends that Sharp was hostile toward him, approached the story with a preconceived slant, and that this animosity (which could be considered common law malice), demonstrated actual malice. Ross notes that even if common law malice is not the equivalent of actual malice, it can be evidence of actual malice. (*Harte-Hanks Communications v. Connaughton*, *supra*, 466 U.S. at p. 668; *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 258, 208 Cal.Rptr.

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[19] Sharp sent Stephan Holohan a copy of the first article. Changes were made based upon Holohan's comments and the comments of Donald Murphy, a News-Press copy editor. Actual malice cannot be inferred from the fact that changes were made.

137, 690 P.2d 610.) Ross points to statements by Patrick O'Hara, Sharp's former editor, that Sharp called Ross a "sleaze ball" and a "slime bag." Ross also suggests Sharp sought out sources who would confirm her belief that Ross had been investigated for investor fraud, such as contacting state and federal bank regulators and insurance analysts. However, even if the evidence showed Sharp had a bias, it did not demonstrate that her journalistic approach gave way to conscious manipulation of the evidence. (Cf. *Reader's Digest Assn. v. Superior Court*, *supra*, at pp. 258-261, 208 Cal.Rptr. 137, 690 P.2d 610.)

Ross further asserts that the articles provided a one-sided picture of the facts, demonstrating that the News-Press knew the implication was false. However, publishers need not provide "'an objective picture [citation] or an accurate one [citations].' [Citation.] So long as he has no serious doubts concerning its truth, he can present but one side of the story. [Citation.]" (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 259, 208 Cal.Rptr. 137, 690 P.2d 610.) Similarly, Ross's accusation about Sharp's reporting techniques do not show actual malice, as it does not focus on Sharp's attitude about the truth or falsity of the articles. (*Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 185-186, 264 Cal.Rptr. 699 [aggressive, zealous reporting does not demonstrate reporter believed items to be untrue].)

Ross suggests that even if any of the above items, *by themselves*, do not show clear and convincing evidence of actual malice, cumulatively they point to a reporter who was "out to get" Ross, who conducted an investigation aimed at a pre-ordained result, who avoided the truth, and who drafted articles either knowing they were false, or with reckless disregard of the truth.[20] (*Reader's Digest Assn. v. Superior*

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[20] Ross also argues the trial court wrongfully excluded the following three items of evidence relevant to the actual malice issue: (1) facts suggesting

Court, *supra*, 37 Cal.3d at p. 257, 208 Cal.Rptr. 137, 690 P.2d 610.) In raising this suggestion, Ross also brings forth the argument discussed above with regard to the purported lies made by Sharp in her testimony. We do not agree.

"'The standard of actual malice is a daunting one.' [Citation.]" (*Howard v. Antilla*, *supra*, 294 F.3d at p. 252.) Even if the record contained some evidence that could suggest actual malice, and even if all of the facts were construed in the light most favorable to Ross, the record lacked clear and convincing evidence that the News-Press subjectively entertained serious doubts about the truth of the articles or purposefully avoided the truth. There was little evidence that Sharp or McCumber had reason to doubt the veracity of the two articles and the implication drawn therefrom; there was little evidence that they consciously acted to avoid the truth; there were no extreme departures from journalistic standards; the News-Press's explanation was not inherently improbable; and this was not a slipshody investigation. Even if Ross proved Sharp was foolish or negligent, the evidence of actual malice was not such as to command the unhesitating assent of every reasonable mind.

Sharp lied in the first trial when she stated that she did not know she was entering Ross's property in Beverly Hills; (2) a Weitzman letter; and (3) references to loaded words. With regard to the first and third items of evidence, Ross has not shown the trial court abused its discretion in rendering its evidentiary rulings. (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519, 241 Cal.Rptr. 916; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640, 92 Cal.Rptr.2d 115 .) With regard to the Weitzman letter, any argument is waived as Ross does not cite to the record to demonstrate there was an evidentiary ruling. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856, 85 Cal.Rptr.2d 521; Cal. Rules of Court, rule 14(a)(1)(C).) In any event, this evidence does not change the outcome of this case.

In light of the record and the appropriate standards of constitutional law, the trial court did not err in directing a verdict for the News-Press on the issue of malice.

5. THE TRIAL COURT DID NOT ERR IN RULING ON AN IN LIMINE MOTION REGARDING SPECIAL DAMAGES.

Ross contends Judge Kalin improperly revisited a ruling made by Judge Bolin with regard to special damages. This contention is unpersuasive.

a. *Additional facts.*

In October 1999, the News-Press brought a motion in limine re new special damage claims. The News-Press sought an order directing Ross not to refer to, nor submit evidence of, five items of special damages that Ross had added to his complaint.[21]

The motion was made on the ground that these special damage claims "involve alleged losses that are entirely speculative and/or contingent and therefore are unrecoverable as a matter of law."

A hearing was held. Judge Boland issued a tentative opinion. Thereafter, the parties submitted supplemental briefs regarding the court's authority to determine the validity of Ross's claim for special damages on a motion in limine.

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[21] The October 1999 motion was directed at the following five items: Ross's inability to add to his stock holdings in hotel investors; Ross's inability to consummate transactions with the Robert M. Bass group; the rejection of Ross's investment opportunity in a Texas shopping center; Ross's inability to consummate transactions involving student housing properties in Texas; and other potential business opportunities not specifically identified in the amended complaint.

On December 13, 1999, Judge Boland ruled as follows: Typically, in limine motions seek to "keep particular, specified items of evidence from the jury." However, in limine motions may attack all of a party's evidence on a particular issue. When used in such a manner, in limine motions are treated essentially as general demurrers or motions for judgment on the pleadings and only judicially noticeable facts and facts alleged in the pleadings may be considered. Here, the News-Press relied upon non-judicially noticeable extrinsic evidence. Further, the in limine motion could not be treated as a motion for nonsuit. (Code Civ. Proc., § 581c, subd. (a).) Essentially, the News-Press's in limine motion sought a summary adjudication of a claim for damages, but "a court is not statutorily authorized to summarily adjudicate claims for damages, other than exemplary damages, which do not dispose of a cause of action."

Judge Boland held: "Under Los Angeles Superior Court Rule 8.92(b), 'a motion in limine shall not be used for the purpose of seeking . . . summary adjudication of an issue or issues. Such motions may only be made in compliance with Code of Civil Procedure § 437c and court rules pertaining thereto.' Defendants seek summary adjudication of the validity of certain special damages claims. The fact that special damages claims could not be summarily adjudicated in compliance with § 437c does not mean that defendants can summarily adjudicate them on a motion *in limine*. Under Rule 8.92(b), if the alleged damage claims cannot be stricken as defectively plead, then the damage claims will survive at least until trial. At that point, defendants will be entitled to seek relief on the grounds that the claims are too speculative in the form of a motion for nonsuit, a motion for judgment under Code of Civil Procedure § 631.8, or a motion for judgment notwithstanding the verdict." (Fn. omitted.)

Thereafter, the parties each filed a number of in limine motions.[22] Some of the individual motions filed by the News-Press sought to prevent Ross from introducing the items that the News-Press had labeled speculative in the October 1999 motion. (See fn. No. 21.)

On March 8, 2000, the case was transferred to the long cause department and to Judge Kalin.

Prior to trial, Judge Kalin examined each motion in limine separately and rendered individual rulings. Some motions were granted, some were granted without prejudice, and some were denied.

In limine motion number 23 sought to exclude evidence relating to the Robert M. Bass group.[23] Judge Kalin granted in limine motion number 23, without prejudice. During trial, Judge Kalin sustained the evidentiary objection as speculative.

b. *Discussion.*

Ross contends Judge Boland's ruling precluded Judge Kalin from addressing the News-Press's motion in limine number 23. Ross argues Judge Kalin lacked the jurisdiction to consider this in limine motion.[24] This contention is not persuasive.

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[22] According to the News-Press, the parties filed a total of 45 in limine motions.

[23] Ross claimed that he had approached the Robert M. Bass group with a proposal that would have resulted in a capital infusion in the Santa Barbara S&L, which in turn would have prevented the April 1990 federal takeover of the bank. Ross also claimed that he had another plan with the Bass group involving mortgage-backed securities that eventually would have resulted in approximately $250 million to him.

[24] Ross raised this issue in his opening brief on pages 56 to 66, without identifying which, if any, of the numerous motions in limine were improper.

By Judge Boland's December 13, 1999, ruling, he concluded that the motion as brought, which specifically requested an entire *classification* of evidence be excluded, was an improper attempt to summarily adjudicate an entire claim for damages. He noted that at trial the News-Press could use other vehicles to address whether *specific* damage claims were speculative. For example, Judge Boland opined that the News-Press could bring motions for nonsuit, for judgment under Code of Civil Procedure section 631.8, or for judgment notwithstanding the verdict. By this order, Judge Boland did not limit the type of vehicle by which the News-Press could address its argument with regard to individual items of evidence. Nor did Judge Boland address the admissibility of the specific items discussed in the motion.

The in limine motions considered by Judge Kalin immediately before trial, did not request reevaluation of the issue addressed by Judge Boland, i.e., whether it was procedurally proper to use an in limine motion to eliminate an entire classification of evidence. The motions considered by Judge Kalin, including motion in limine number 23, requested specific evidentiary rulings. They did not seek to adjudicate an

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Ross's opening brief also omitted many vital citations to the record, including citations with regard to Judge Kalin's rulings. The only indication in Ross's opening brief as to which motion(s) Ross considered improper was found on page five, in the section labeled "procedural background." On page five, Ross cited to volume 22, pages 6398 to 6556 of his appendix, which was the News-Press's motion in limine number 23. In Ross's reply brief, he stated that his discussion involved the News-Press's motions in limine numbers 8, 9, 20, 21, 22, 23, and 24.

We granted the News-Press's motion to strike that portion of Ross's reply brief that discussed the News-Press's motions in limine numbers 8, 9, 20, 21, 22, and 24, as they were not addressed in Ross's opening brief. We also granted the News-Press's motion to strike pages 66 to 71 of Ross's reply brief discussing Judge Kalin's instructions and admonitions to the jury as Ross's opening brief had not raised any issues or arguments relating thereto.

entire claim for damages. Thus, they were not attempts to circumvent Judge Boland's procedural ruling, nor were they improper motions for reconsideration. (Cf. *Payne v. City of Perris* (1993) 12 Cal.App.4th 1738, 1742, 16 Cal.Rptr.2d 143; *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876, 282 Cal.Rptr. 706; *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 233 Cal.Rptr. 607; Code Civ. Proc., § 1008 [motions for reconsideration].)

Judge Kalin's motion had the jurisdiction to rule on motion in limine number 23.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

We concur: CROSKEY, Acting P.J., and KITCHING, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEONARD M. ROSS, Plaintiff, vs. SANTA BARBARA NEWS PRESS, INC., a California corporation; KATHLEEN SHARP, an individual; B. DALE DAVIS, an individual; DAVID McCUMBER, an individual; and DOES 1 through 10, inclusive, Defendants.	Case No. C744583 ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUE

On June 24, 1991, the Motion For Summary Adjudication of plaintiff Leonard M. Ross came on regularly for hearing in Department 52, the Honorable Harvey A. Schneider, presiding. Rex S. Heinke and Kelli L. Sager of Gibson, Dunn & Crutcher appeared on behalf of defendants Santa Barbara News-Press Division, a division of The New York Times Company, David McCumber, and Kathleen Sharp ("defendants"); Anthony Michael Glassman and Eleanor Oths of Glassman & Browning, Inc., appeared on behalf of plaintiff. Subsequent argument was heard on June 27, 1991.

After full consideration of the papers filed by the parties, the supporting evidence submitted, and the oral

arguments of counsel, the Court finds that there are no triable issues of material fact which are raised by the Motion, and finds as a matter of law that plaintiff is a private figure for purposes of this litigation. Accordingly, plaintiff's Motion For Summary Adjudication is granted.

In a defamation action, the status of the plaintiff is relevant to a determination of the appropriate standard of care necessary to prove compensatory damages. Plaintiff's Motion seeks to have him declared a private figure for purposes of this litigation. Defendants contend, however, that plaintiff is a limited purpose public figure.

The standard for determining whether an individual is a limited purpose public figure is whether that individual has thrust himself to the forefront of a particular public controversy "in order to influenced the resolution of the issues involved." *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 345 (1974); *see also Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

Defendants contend that there was a public controversy concerning the ownership and operation of Santa Barbara Savings and Loan (SBSL), and that plaintiff thrust himself into this controversy by seeking to "influenc[e] the ownership and operation of the bank" by increasing his ownership interest in SBSL and by criticizing management of SBSL at a shareholders' meeting. (Defendants' Opposition at 5, and Exhibit B.) Plaintiff contends that there was no public controversy with respect to SBSL at the time of defendants' articles. (*E.g.*, Exhibits B & C to Munoz Declaration.)

This Court finds. that at the time plaintiff sought to increase his ownership interest in SBSL, there was no public controversy concerning the management and ownership of SBSL; consequently, there was nothing into which plaintiff could have thrust himself "in order to influence the resolution of issues." The fact that there may have existed a national

problem with the savings and loan industry in general (see Defendants' Opposition at 2-4, and Exhibit B), does-not compel a different conclusion. Much like the plaintiff in *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), there is no evidence that plaintiff at any "time assumed any role of public prominence in the broad question of concern" about the savings and loan industry.

Plaintiff's attempt to increase his ownership interest in SBSL did not create a public controversy. Counsel for defendants conceded at oral argument that no one was opposed to plaintiff's attempt to increase his ownership interest. No public controversy can exist without there being two sides to the controversy; a one-sided "controversy" is a contradiction in terms. It is the absence of a controversy that distinguishes this case from such cases as *Kaufman v. Fidelity Federal Savings and Loan Association*, 140 Cal.App.3d 913 (1983) and *Hoffman Co. v. E.I. Du Pont De Nemours & Co.*, 202 Cal.App.3d 390 (1988), both of which involved bona fide, two-sided controversies.

The Court also does not agree with defendants' argument that plaintiff's criticism of the SBSL management created a public controversy. Indeed, it appears that after plaintiff appeared at the SBSL shareholders' meeting, at which he complained about astronomical expenses, management effected changes to curtail such expenses. (Exhibits A and B to Opposition; Ross Declaration, para. 4.) Thus, it appears that plaintiff's conduct, instead of creating controversy, had the effect of causing SBSL's management to change its spending policies.

Accordingly, without a public controversy, there was no identifiable issue with respect to which plaintiff was seeking to influence the resolution.

For these reasons, it is hereby

ORDERED that plaintiff's Motion For Summary Adjudication be, and it hereby is, GRANTED.

Dated: October 9, 1991

/s/_____
Judge Harvey A. Schneider
Los Angeles Superior Court

Submitted by:

Gibson, Dunn & Crutcher
Rex S. Heinke
Kelli L. Sager
Karen N. Frederiksen

By: _____
Kelli L. Sager

Attorneys for Defendants
Santa Barbara News-Press Division,
a division of The New York Times Company,
David McCumber, and Kathleen Sharp

Court of Appeal, Second Appellate District, Division Three - No. B 151127

S12003

IN THE SUPREME COURT OF CALIFORNIA
En Banc

LEONARD M. ROSS, Plaintiff, Appellant and Cross-respondent,

v.

SANTA BARBARA NEWS PRESS, ETC. et al., Defendants, Respondents and Cross-appellants.

Petitions for review DENIED.

[FILED JAN. 14, 2004]

/s/ George
Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEONARD M. ROSS,	)	B082419
	)	
Plaintiff, Respondent	)	(Super. Ct. No.
and Cross-Appellant,	)	C744583)
	)	
	)	
	)	
NEW YORK TIMES	)	
COMPANY, KATHLEEN	)	
SHARP, and	)	
DAVID McCUMBER,	)	[Filed Mar 24, 1997]
	)	
Defendants, Appellants and	)	
Cross-Respondents	)	

THE COURT:*

APPEAL from orders of the Superior Court of Los Angeles County, Harvey A. Schneider, Judge. Affirmed.

This is a libel action by plaintiff Leonard M. Ross (Ross) against defendants, the Santa Barbara New-Press, a division of the New York Times Company, Kathleen Sharp, and David McCumber (collectively referred to as the News-Press), arising from publication of two newspaper articles

* KITCHING, Acting P.J. ALDRICH, J.

about Ross. The articles discussed at length Ross's association with Barry S. Marlin, an individual who was incarcerated for investor fraud. The jury found in Ross's favor, against the News-Press, in the sum of $5 million for damage to reputation, plus $2.5 million for emotional harm. The judgment rested upon the jury's finding that Ross was defamed from the following false implication: "The tone and tenor of the [first article was] that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison."

The News Press moved for judgment notwithstanding the verdict or new trial. The court denied j.n.o.v. but ordered a new trial, on two grounds: the special verdict was internally inconsistent and the emotional distress award was excessive. Both sides appeal. We affirm.

CONTENTIONS

The News Press contends it was entitled to judgment in its favor, on six grounds: (1) Ross's retraction demand was inadequate; (2) The implication was not actionable because it was true or substantially true; (3) Ross was a limited public figure; (4) Ross produced insufficient evidence to prove his damages were caused by the libel; (5) Libel by implication requires the implication to have been produced by juxtaposing, unrelated statements or produced by omitting facts; and (6) The proposition found libelous was not actionable because it was not provable as true or false.

Ross contends the trial court erred in ordering a new trial for the following reasons: (1) The jury's special verdict was not internally inconsistent; (2) The award for emotional harm was not excessive and the order did not sufficiently state reasons for this ruling; and (3) The trial court failed to offer him are mittitur.

FACTUAL AND PROCEDURAL SUMMARY

1. FACTS

a. *The Articles.*

The action is based on two front-page articles about Ross appearing in the Santa Barbara News-Press, a daily newspaper published by The New York Times Company. Defendant Kathleen Sharp wrote the articles. Defendant David McCumber was executive editor.[1]

The first article appeared on Sunday, November 27, 1988, with the headline "S&L investor: Inquiries, suits mark career." It contained 102 paragraphs, plus a sidebar box consisting of a 15-item chronology. The article began with the statement, "Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law-enforcement agencies, is seeking to increase his stake in Santa Barbara Savings and Loan Association's parent company to almost 25 percent of outstanding shares." The next few paragraphs stated Ross had collected $20 million in damages from insurance companies who had defended him in investor lawsuits and his partner, Barry S. Marlin, had been convicted of defrauding investors. The beginning of the article also stated that Ross had denied any wrongdoing and stated he had been unfairly tainted with Marlin's problems.

In the subsequent paragraphs, the article reported the following: Ross had obtained federal regulatory approval, and was awaiting state regulatory approval, for his proposal to buy shares sufficient to increase his shareholdings from 9.9 percent to 24.9 percent in Financial Corporation of Santa Barbara, the holding company of Santa Barbara Savings and Loan

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[1] As noted above, unless otherwise sigificant, we collectively refer to defendants as the News-Press.

Association (Santa Barbara S & L). Santa Barbara S & L had been troubled in recent years and state regulators were taking a close look at Ross's share-purchase proposal.

Numerous paragraphs discussed Ross's resolution of investor lawsuits and the fact that Ross "pocketed more than $20 million" when he sued his former insurance companies. The balance of the article reported at length the results of the newspaper's study of court documents, transcripts of federal proceedings and comments of various individuals, including comments by Ross and his attorneys. These matters concerned Ross's business affairs during the period 1968 to 1973, and ensuing investigations and litigation, some of which was ongoing at the time of publication. These business affairs derived from Ross's association with Marlin. Ross and Marlin were partners in an investment firm from early 1969 until late 1971, when Ross withdrew from the business. The article discussed Marlin's criminal activities, Ross's association with Marlin, the investor frauds committed by Marlin, and the fact Marlin was investigated by governmental agencies for these frauds and eventually incarcerated. Additionally, the article discussed accusations Marlin had leveled against Ross for pistol-whipping, extortion, and kidnapping, claiming Ross had forced him to turn over part of their business ventures. The article also discussed Ross's association with Attorney Lynn Boyd Stites.

The article contained additional information about Ross, such as he was valedictorian of his law school class at UCLA and lived in the Hearst-Davies mansion in Beverly Hills. It reported one of Ross's attorneys was Howard L. Weitzman, who had represented John DeLorean and Mike Tyson; Ross had successfully sued insurance companies for acting in bad faith; Ross had ended his association with Marlin before Marlin began defrauding investors; after investigating Ross's affairs, law enforcement authorities had not accused

Ross of any crimes; and investors who sued Ross had never established any wrongdoing on his part.

The accompanying sidebar chronology began in 1968. The first item stated Ross graduated first in his law school class; the last item stated in 1988 Ross had settled his bankruptcy case and also applied for approval to purchase additional shares of the Santa Barbara S&L. Marlin is mentioned in eight of the fifteen boxes.

The second article, captioned "Rosses drop bid to buy S&L stock," appeared three months later, on Tuesday, February 28, 1989. It contained only 18 paragraphs. It reported Ross had withdrawn his share-acquisition proposal. It reported the share price had dropped, dividend payments had stopped, and Santa Barbara S & L had lost money in 1988 and planned to make personnel and salary reductions. The article briefly summarized the first article, discussing that Ross had been investigated by a number of law enforcement agencies for alleged fraud; investors who participated in the Ross/Marlin syndicates claim they had been defrauded, and even though Marlin had been convicted, Ross was never charged with a crime or convicted of any wrongdoing.

b. *Major Factual Controversy at Trial.*

At trial, the major factual controversy centered upon the investigation(s) of Ross and of Marlin.

The parties agreed that Ross was investigated in 1972 - 1974 for violations of the Hobbs Act (business taken through extortionate means), after Marlin accused Ross of extortion, kidnapping and pistol-whipping. This investigation was due to Marlin's 1971 accusation that shortly before Ross withdrew from the business, Ross, accompanied by his brother and two thugs, forcibly held Marlin prisoner in Ross's apartment overnight while they examined the books and records of the

business. Marlin also told government investigators that Ross and others summoned Marlin to Ross's office, where they beat Marlin, struck him with a gun, and forced him to sign documents conveying his interest in the business to Ross. Ross was the target of this investigation, which was conducted by the FBI, a federal grand jury, and the Los Angeles Strike Force of the Organized Crime and Racketeering Section of the U.S. Department of Justice. The parties presented contradictory testimony on whether or not the 1972 - 1974 investigation also was conducted by the United States Postal Service, the I.R.S. or the S.E.C. However, both parties agreed that no charges were filed against Ross.

The parties also agreed that in 1976 Marlin was investigated for investor frauds; in 1978 he was convicted and eventually imprisoned. The parties further agreed that persons had invested in limited partnerships and joint ventures promoted by Marlin and Ross, resulting in dozens of civil lawsuits filed against both Ross and Marlin.

A major controversy at trial turned on whether or not the criminal acts for which Marlin was indicted all occurred after Ross had terminated his relationship with Marlin and whether or not Ross had been involved, mentioned, connected to, or the subject of the 1976 investigation.

2. PROCEDURE

a. *Pretrial Proceedings.*

Ross sued the News-Press for defamation.

The News-Press filed a motion in limine, contending Ross's retraction request was inadequate as a matter of law. The trial court rejected this argument, as it did subsequently in ruling on the News-Press's motion for judgment not withstanding the verdict.

Upon Ross's motion for summary adjudication, the trial court held that for purposes of this litigation, Ross was a "private person" and not a "limited public figure."

The trial court denied News-Press's motion for summary judgment contending it was absolutely privileged to publish the two articles.

The trial court ruled on numerous motions, the effect ofwhich excluded Ross from introducing evidence relating to special damages for lost business opportunities, precluded Ross from deposing certain witnesses and introducing evidence relating to his application before the California Department of Savings and Loan, and limited the evidence Ross could submit relating to damages to his reputation.[2]

b. *The Verdict Forms.*

The action was submitted to the jury for its determinations regarding four explicit statements (two from each article), plus two unstated implications (one from each article). As to each statement and implication, the jurors were asked by special interrogatories whether it was false or libelous; whether any defendant was negligent in writing or publishing it, and whether it was the legal cause of injury to Ross.

As to the two unstated implications, the jurors were also asked to find whether the alleged implication was the tone and tenor of the article in which it appeared.

The six items were as follows:

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[2] Ross's claim for medical expenses was dismissed during trial.

FIRST ARTICLE

(1) [Taken from the article's sidebar, captioned "A Ross Chronology"]: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission."

(2) "The parking attendant was never found, said Arnold."

SECOND ARTICLE

(3) "As reported by the News-Press recently, Ross has been. investigated by a number of law enforcement agencies for alleged fraud."

(4) "The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations."

THE IMPLICATIONS

(5) [The "tone and tenor (the implication)" of the first article was] "that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison."

(6) [The "tone and tenor (the implication)" of the second article was] "that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison."

c. *The Verdict.*

The basis of the libel judgment in Ross's favor was the fifth item only the first article's implication "that Ross was

investigated by the government for the investor frauds that sent his former partner Marlin to prison." The jury found this was the article's implication, the News-Press was negligent with respect to this implication and it was a legal cause of injury to Ross.

The jury also found the first three items to be false, libelous, and negligently prepared. However, the jury concluded these three items were not the legal cause of injury to Ross. The remaining items were not found actionable for other reasons.[3]

The jury awarded Ross $5 million for reputational damages and $2.5 million for emotional distress damages.

d. *Further Proceedings.*

On October 4, 1993, the court entered judgment on the verdict. Thereafter, the trial court denied the New-Press's motion for judgment not withstanding the verdict, but ordered a new trial. It explained that its new trial order was based on two grounds. The first was that finding item 5 false (that the first article created a false implication "that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison") was irreconcilable with finding item 4 *not* false ("The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations").

The second ground for granting the new trial motion was the excessiveness of the $2.5 million award for emotional distress.

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[3] The jury found the fourth item was neither false, libelous, negligently stated nor a cause of Ross's injuries. It further found it was a fair and true report of an official government record. The jury also found the sixth item was not an implication of the second article.

The trial court also addressed, but did not rest its ruling upon, a third ground for granting the new trial motion: the inconsistency between the jury's finding item 5 false and a cause of damages, while at the same time finding item 1 ("A Ross Chronology"]: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission") and item 3 ("As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud") were false, but *not* a legal cause of damages to Ross.

Ross's motion to vacate the new trial order was denied.

Both parties appealed. The News-Press appealed from the trial court's order denying judgment notwithstanding the verdict and from the order denying it summary judgment and granting Ross's motion for summary adjudication.

Ross appealed from the order granting a new trial from the order denying his motion to vacate and from various pre-trial evidentiary rulings.

DISCUSSION

1. CONTENTIONS BY THE NEWS-PRESS

a. *We Find Ross's Retraction Demand Was Adequate.*

The News-Press contends it is entitled to judgment because the retraction demand did not specifically identify the implication for which the jury awarded damages.[4] This contention is not persuasive.

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[4] There were two retraction demands, one made after each publication: The

(1) *Applicable Law.*

Plaintiffs seeking damages other than special damages must make a correction demand to the media publisher.[5] The written retraction request must specify the "statements claimed to be libelous and demand[] that the same be corrected...." (Civ. Code, § 48a.)[6] The retraction requirement applies to explicit defamatory statements as well as to defamatory statements by implication. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 33.)

"The purpose of the requirement for the described specificity is to facilitate the publisher's investigative efforts in determining whether statements in the initial article contained error and should be corrected. By designating the remarks that the objector considers libelous, a notice may enable the publisher to narrow the scope of his investigation.... [¶] The crucial issue in evaluating the adequacy of the notice turns on whether the publisher should reasonably have comprehended which statements plaintiff protested and wished corrected." (*Kapellas v. Kofman, supra*, 1 Cal.3d at pp. 30-31; *Freedom Newspapers, Inc. v. Superior Court* (1992) 4 Cal.4th 652, 657-658; *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 553-554.)

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only one in issue here is the first retraction demand.

[5] The trial court ruled Ross could not demonstrate any special damages.

[6] Civil Code Section 48a reads in part: "In any action for damages for the publication of a libel in a newspaper... plaintiff shall recover no more than special damages unless a correction be demanded and be not published .... Plaintiff shall serve upon the publisher, at the place of publication... a written notice specifying the statements claimed to be libelous and demanding that the same be corrected: Said notice and demand must be served within 20 days after knowledge of the publication... of the statements claimed to be libelous."

Retraction demands "do not compose formal legal complaints [and they need not] conform to the niceties of common law pleading. [Civil Code section 48a was not intended] to build technical barricades to recovery by the individual who had given notice sufficient to advise a reasonable publisher acting in good faith of the claimed error." (*Kapellas v. Kofman, supra*, 1 Cal.3d at p. 31.) In determining the comprehensibility of the notice, the length of the article, along with other factors, such as the reasonable interpretation of the article, are evaluated. (*Id.* at pp. 32, 34.) Retraction demands are read "in conjunction with the questioned article. . . ." (*Id.* at p. 31.).

The adequacy of the correction demand is a legal issue for the court. Accordingly, we review the issue de novo. (*O'Hara v. Storer Communications, Inc.*, (1991) 231 Cal.App.3d 1101, 1110; *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 936.)

(2) *Discussion.*

Here, the first article contained 102 paragraphs and a chronology box consisting of 15 items, involved numerous topics, including Ross's interest in Santa Barbara S&L, accusations against Ross of pistol-whipping, kidnapping and extortion and a description of numerous civil lawsuits filed against Ross. Additionally, it discussed Ross's association with Marlin; the investigation by federal agencies of Marlin's activities and Marlin's eventual incarceration. In Ross's retraction demand, Ross detailed 22 statements (or multi-statement passages) which he asserted were false, misleading and libelous. The demand did not specifically request the News-Press retract the implication that the government had investigated Ross for "the investor frauds that sent his, former partner Barry Marlin to prison."

However, the retraction demand specifically requested retraction of the article's first statement, i.e., "Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law enforcement agencies, ..." It also objected to the "clear design of [the 22] statements [which] is to portray [Mr. Ross] in the worst possible light, including but not limited to, portrayal of Mr. Ross as . . . being knowingly involved in illegal activities . . . ."

The article repeatedly linked Marlin and Ross together, including their financial affairs. In context of the article, the request to retract the first statement put the paper on notice that Ross deemed defamatory the implication he was investigated for the investor frauds for which Marlin was imprisoned.[7] Given the nature of the article and the retraction request, the paper was put on notice of that which Ross wished corrected. Unlike *Gomes v. Fried, supra*, 136 Cal.App.3d 924, the retraction notice here was sufficiently particular.

b. *It is Not Appropriate For Us to Conclude That The Implication Was Not True Nor Substantially True.*

The News-Press contends the implication was not actionable because it was true, or substantially true. This contention is not persuasive.

(1) *Applicable Law.*

(a) *Substantial Truth*

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[7] Originally, the trial court found the first statement in the first article to be true because "[m]y reading of the statement in context, ... is that it applies equally to both investigations...." The trial court later clarified its ruling, finding the statement "not to be actionable...." Thus, the parties were instructed to classify this statement as "unchallenged," i.e., that Ross had not contended it was false or defamatory.

"The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations.] It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citation.] . . . Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citation.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517.)

"In libel actions in which the questioned statement is susceptible to several interpretations, the initial function of the court is to determine whether the publication could reasonably have been understood to have a libelous meaning. It then becomes the jury's function to determine from the evidence which of the potential meanings was actually drawn by the readership." (*Kapellas v. Kofman, supra*, 1 Cal.3d at p. 34, fn. 14.) In making this inquiry, the publication is not evaluated under the microscope of persons "'trained in the law, but by the natural and probable effect upon the mind of the average reader.' [Citation.]" (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688.)

(b) *Burden of Review.*

Even though we are not dealing with the issue of malice, where the Supreme Court has mandated an independent review of the issue (*Base Corp v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485; *McCoy v.Hearst Corp.* (1986) 42 Cal.3d 835, 842), the News-Press contends we must review the

issue of truth and substantial truth by the same standard, contending it is an ultimate constitutional question of law. (*Locricchio v. Evening News Ass'n* (Mich. 1991) 476 N.W. 2d 112 [independently reviewed falsity in case brought by private person on matter of public concern]; cf. *Franklin v. Leland Stanford Junior University* (1985) 172 Cal.App.3d 322, 330). This standard of review requires us to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof [of the issue.]" (*Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. at p. 511.) The parameters of an independent review in defamation cases are uncertain. (Elder, Defamation: A Lawyer's Guide (1993) § 4:1, pp. 1-6; Smolla, Law of Defamation (1996) § 12.094)], p.12-42 - 12-52; *Locricchio v. Evening News Ass'n, supra*, 476 N.W.2d at pp. 134-135 (dis. opn. of Cavanagh, J.).) However, in applying an independent review, we do not totally disregard the findings of the jury, which was in the best position to observe the demeanor of the witnesses. (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 688; *Newton v. National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 670-672.) Further, at a minimum, an independent review requires us to apply the law to those facts which were necessarily found by the jury, in conjunction with the uncontroverted facts. (*Harte-Hanks Communications v. Connaughton, supra*, 491 U.S. at pp. 697-698 (conc. opn. of Scalia, J).)

Here, we need not determine whether or not the issue of truth and substantial truth is a constitutional issue, demanding the elevated burden of scrutiny. For purposes of discussion, we shall treat the issue as a constitutional one requiring an independent review. (*Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. 485; *Harte-Hanks Communications v. Connaughton; supra*, 491 U.S. 657; compare with *Lundell Mfg. v. American Broadcasting Companies* (8th Cir. 1996) 98 F.3d 351, 358-360 [when underlying facts as to gist and sting of

defamatory charge are undisputed court may determine substantial truth as matter of law, otherwise sufficiency of evidence analysis applied in case brought by private plaintiff against media defendant].)

(2) *Discussion.*

As explained above, at a minimum, under the independent review utilized in evaluating some defamation issues, we apply the law to the facts which were necessarily found, in conjunction with the uncontroverted facts. The difficulty here is that the verdict leaves no roadmap for us to follow. As we discuss in depth below, the verdict was inconsistent on major issues. It did not show clearly the jury's conclusion as to the truth or falsity of the claim Ross was investigated for the frauds for which Marlin was imprisoned. Further, if indeed the jury concluded the first article was false because it stated or implied Ross was investigated for the frauds for which Marlin was imprisoned, the verdict did not clearly indicate whether or not that falsity caused Ross damages. Thus, on the major factual issues, we cannot determine what the jury necessarily found. Having such ambiguous results, does not enable us to determine if the article, when taken as a whole, was true or substantially true.

In arguing the inference was substantially true, the News-Press states the following statements are true and uncontroverted: (1) Ross and Marlin were business partners and their business included third party investors; (2) Between 1972 and 1974 Ross was investigated by three law enforcement agencies, and this investigation, which included allegations Ross committed extortion, pistol-whipping and kidnapping, involved his relationship with Marlin; (3) The 1972 - 1974 investigation of Ross arose from allegations of investor fraud; (4) Investigator Twitty recommended Ross be indicted; (5) Ross's name came up when Marlin was being investigated for the crimes for which Marlin was incarcerated; and (6) Ross and

Marlin were accused of investor fraud in civil lawsuits. The News-Press then argues it was substantially true Ross was investigated by the government for the investor frauds which sent Marlin to prison.

However, all of these statements, and the inferences the News-Press wishes us to draw from these statements, were-not uncontroverted. Additionally, by the jury's verdict, we cannot ascertain how the jury determined the factual issues involved. In order for us to evaluate the News-Press's argument, we would have to render factual conclusions which were for the jury to decide. (*Harte-Hanks Commwncations v. Connaughton, supra*, 491 U.S. at p. 688.) Further, we would have to evaluate the six statements in conjunction with the facts which were necessarily found, and we cannot determine from the inconsistent verdict exactly what was necessarily found. Thus, we are without sufficient factual findings upon which a determination of substantial truth can be made.

c. Ross Was Not a Limited Public Figure.

The News-Press contends Ross was a limited public figure. It then argues that since the jury found there was no malice, judgment must be rendered in its favor. This argument is not persuasive.

(1) Relevant Facts.

At the time the articles were published, Ross was the largest individual shareholder of Financial Corporation of Santa Barbara, the parent company of Santa Barbara S&L, the oldest and largest savings and loan in Santa Barbara. Together with his wife, Ross held approximately 9.9 percent of the stock. In April 1988, Ross attended a shareholder meeting for the Santa Barbara S&L where he spoke for approximately two to three minutes, suggesting a reduction in expenses. After the meeting, Ross declined to be interviewed by the News-Press.

In approximately August 1988, Ross applied to the banking regulatory agencies for permission to increase his ownership share in the Santa Barbara S&L to almost 25 percent. Prior to the publication of the first article, Ross had never given a press conference, had never held or run for public office, had never participated in any mass media (except for an appearance on the "Dating Game" 30 years ago), had never given any public speeches, and with the exception of one Coastal Commission hearing, had never appeared before any public agencies. He was active in a numberof civic organizations, a member in good standing with the California State Bar and also a licensed real estate broker.[8] Prior to the publication of the November 27, 1988, article and after repeated requests, Ross consented to be interviewed.

Prior to publication of the articles in question, more than 50 articles had been published about the Santa Barbara S & L. Most of the articles were reports of its routine business affairs, such as personnel changes, summaries of its profits and losses, and its plans to sell branch offices. One article reported about the shareholder meeting in which Ross criticized management and that Ross had been unwilling to talk to reporters after the meeting. Other articles discussed general concerns about the banking industry.

(2) *Applicable Law.*

New York Times Co. v. Sullivan (1964) 376 U.S. 254 held public officials may not recover for a defamatory

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[8] Additionally, Ross was the chairman of the board, founder and sole shareholder of Rossco Holdings Incorporated, and majority shareholder of Lodge Co. Properties, Ltd., a closely held family partnership. These entities were involved in various real estate activities in Texas and California. Ross was also the general partner and majority interest owner in several closely held real estate and security investment partnerships. Further, he had engaged in the public debate over thepurchase of land in the Santa Monica mountains.

falsehood unless there was proof the statement was made with "actual malice." (*Id.* at pp. 279-280; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 721-722.) This requirement of proving malice was extended later to public officials and to private individuals not holding public office who are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." (*Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 164 (Warren, C.J., conc. opn.) Persons who fall into this latter category are labeled "limited" or "vortex" public figures. (2 Smolla & Nimmer on Freedom of Speech (1996) § 23:4, p. 23-21.)[9]

Society's interest in protecting an individual's reputation prevents transmutation of all individuals into limited public figures simply because there exists or the media has generated an interest in, an individual or a subject matter. (*Wolston v. Reader's Digest Assn., Inc.* (1979) 443 U.S 157, 167-168; 4 Rotunda & Nowak (1992), § 20.35, p. 224.) "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Hutchinson v. Proxmire* (1979) 443 U.S. 111, 135.)

An individual is a limited public figure when he "voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351, limited by *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1.)

An issue is not a "public controversy" merely because it is newsworthy. "[I]t must be a real dispute, the outcome of

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[9] Determining whether an individual is a limited public figure is a question of law for the court. (*Rosenblatt v. Baer* (1966) 383 U.S. 75, 88; *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203.).

which affects the general public or some segment of it in an appreciable way." (*Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1296.) Private disputes attracting public attention do not suffice as a "public controversy." (*E.g., Time, Inc. v. Firestone* (1976) 424 U.S. 448.)

A limited public figure is one who "thrust himself into the vortex of this public issue [to] engage the public's attention in an attempt to influence its outcome." (*Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 352.) It is an individual who acts "in order to influence the resolution of the issues involved ..." (*id.* at p. 345; accord, *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252-255); and who has sought to influence public affairs, or by his or her position, can be expected to have a "major impact on the resolution of a specific public dispute. . . ." (*Waldbaum v. Fairchild Publications, Inc., supra*, 627 F.2d at p. 1292.)

(3) *Discussion.*

Even if there was a nationwide discussion involving the savings and loan industry, the articles did not focus on this discussion or localize it to the Santa Barbara area. Rather, the articles discussed Ross's involvement with the bank and his desire to purchase an additional interest in the bank. Thus, as to this focus, any controversy was created by the newspaper articles. General concern over an itent of interest to the community would not suffice to convert the general subject of the banking industry into a public controversy.[10]

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[10] *Time, Inc. v. Firestone, supra*, 424 U.S. 448 [prominent Palm Beach society woman in hotly contested divorce, "public controversy" not equated with public interest]; *Gertz v, Robert Welch, Inc., supra*, 418, U.S. 323 [rejecting *Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29, which had required malice when falsehood related to matters of general or public interest].

Further, even if there was a public controversy and an interest in the banking industry, the nature and extent of Ross's involvement was limited. He did not create the controversy. (Compare with *Freedlander v. Edens Broadcasting, Inc.* (E.D. Va. 1990) 734 F. Supp. 221, 230.) Ross did not thrust himself into any dispute. Ross did not engage in conduct he knew would markedly elevate the chances he would become embroiled in a public controversy.[11] Ross did not have a history of setting standards in the banking industry. (Compare with *Waldbaum v. Fairchild Publications, Inc., supra*, 627 F.2d 1287.) While Ross sought to increase his percentage ownership in Santa Barbara S & L, neither his shareholder status, his professional status, nor his status as a prominent business person invited public attention such that he relinquished his concerns about his name. Further, his application with governmental agencies did not convert Ross into a limited public figure, or otherwise everyone who made such a request would lose their private person status. (*Hutchinson v. Proxmire, supra*, 443 U.S. 111 [research behavioral scientist not limited public figure even though had applied for and received public funding, filed reports with a public agency and public concerned about public expenditures, as otherwise everyone who received or benefited from public grants for research would be a public figure].)

Additionally, Ross did not act to attract the media or to influence a public debate. He did not maintain continuing or even sporadic contact with the media. Certainly, speaking for two or three minutes about expenditures did not make Ross a

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[11] *Wolston v. Reader's Digest Assn. Inc., supra*, 443 U.S. 157 [plaintiff cited for contempt for failing to appear before grand jury not limited public figure when no attempt to engage public's attention to influence resolution of issues involved; association with matter attracting public attention not sufficient to diminish his interest in protecting his name]; compare with *Silvester v. American Broadcasting Companies, Inc.* (11th Cir. 1988) 839 F.2d 1491, 1496-1497, disagreed with by *Ayala v. Washington* (D.C. App. 1996) 679 A.2d 1057, 1066, fn.6.

vocal advocate and merely responding to the News-Press's inquiries did not justify making him into a public figure. (Cf. *Wolston v. Reader's Digest Assn., Inc., supra*, 443 U.S. 157; *Time, Inc. v. Firestone, supra*, 424 U.S. at p. 454-455, fn. 3.)[12]

d. *Ross Produced Evidence His Damages Were Caused by the Libelous Inference.*

The News-Press contends it is entitled to judgment as a matter of law because the facts failed to show the alleged libelous inference caused Ross's injuries. The News-Press admits witnesses testified the article affected Ross's reputation and caused him emotional distress. However, the News-Press argues the testimony never connected these injuries to the alleged libelous implication. This contention is not persuasive.

Even if the implication was not cited verbatim by witnesses, they testified the false inference caused Ross's injuries. For example, Ross's wife, Merri Jean Ross, testified the articles strained their relationship and affected Ross's relationship with their children. She testified she knew of the charges Marlin had brought forth against Ross in 1972 and 1973. However, before the publication of the first article, she was unaware "that my husband was investigated with Marlin by government agencies for the investor fraud that Marlin went to jail for." Barry Devorzan testified he had discussed the articles with Ross and Ross "pointed out to me that the article was incorrect and unfair in that it suggested that he was

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[12] The News-Press's citation to *Kaufman v. Fidelity Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 913 and *Hofmann Co. v. E. I. DuPont De Nemours & Co.* (1988) 202 Cal.App.3d 390 is unavailing. Speaking at one shareholder meeting and responding to reporter's questions is not analogous to writing local residents to obtain public support for a zoning change in order to influence zoning officials. (Compare with *Hofman, supra.*) Trying to gain a larger share of a savings and loan is not similar to trying to influence public agencies to obtain approval for a building project. (Compare with *Kaufman, supra.*)

involved with this Mr. Marlin. [¶]. . . . [¶] And that they had been partners, and that he had nothing to do with the fraud that sent Mr. Marlin to Prison. . . .[And that information made Ross] upset and angry." More than one witness testified Ross was upset at being linked to his former partner and Marlin's frauds. Additional testimony was that Ross was devastated at being tied to Marlin's frauds and was very concerned because his wife questioned him about the investor fraud portion of the article, connecting Ross to Marlin. Further, Ross's relationship with his wife suffered. One witness testified he was concerned about involving himself in future investments with Ross because the article implied Ross had been involved with governmental investigations. Another testified that when people in Santa Barbara discussed the article they were concerned about allegations of investigations and investor fraud, allegations harmful to Ross's reputation.

These and other statements demonstrate there was sufficient evidence that the alleged false inference connected Ross to the governmental investigations of Marlin and that such inference harmed Ross's reputation and caused Ross emotional distress.[13]

e. *The Law Does Not Require a Libel by Implication to Have the Strict Requirements Suggested by The News-Press.*

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[13] The News-Press argues we are required to independently evaluate the causation issue because this case "[implicates] important First Amendment rights." However, the News-Press has failed to cite any authority holding this elevated standard of review is required in addressing an issue of causation, a traditional tort concept required in all but very few matters. (Cf. Civ. Code, §§ 44, 45a; 46; *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749 [discussing if presumed and punitive damages can be awarded in defamation cases involving purely-private' concerns], *Mitchell v. Gonzales* (1991) 54 Cal. 3d 1041, 1052-1053 [substantial factor test]; BAJI No. 7.04.)

The paper contends libel by implication cannot withstand scrutiny unless the unstated implication was either produced by juxtaposing unrelated statements, or by omitting facts that would dispel it. This contention is not persuasive.[14]

"The usual test applied to determine the meaning of an alleged defamatory utterance is whether it was reasonably understood by the recipient of the communication to have been intended in the defamatory sense." (F. Harper, et al., The Law of Torts, (1986) § 5.4, p. 48.) "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." (Rest.2d Torts (1977) § 563, p. 162.) "Under this standard, in order to prevail on a defamation claim, the language used must, as a matter of law, be reasonably capable of a defamatory interpretation and a jury must find that the language was actually understood by the recipient in that sense." (*White v. Fraternal Order of Police* (D.C. Cir. 1990) 909 F.2d 512, 519; accord, Rest.2d Torts, *supra*, § 614, p. 311.) "[W]e look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication." (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.)

In describing libel by implication, Prosser and Keeton on Torts (5th ed. 1988 pocket supp.) section 116, page 117 states, "if the defendant *juxtapases a series of facts* so as to imply a defamatory connection between them, or creates a defamatory implication by *omitting facts*, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct."

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[14] The News-Press also argues libel by implication is only actionable if the implication was the primary implication to be drawn from the publication or intended by the publisher. However, even if this were the test when the plaintiff was a private individual, Ross presented evidence demonstrating both requirements.

(Italics added; fns. omitted.) Borrowing the italicized portion of Prosser's language, which has been repeated in some California authority (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1003, fn. 10; *James v. San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1, 12), the News-Press suggests libel by implication must be created by juxtaposing unrelated statements, or by producing the artifice of omitting facts that would dispel it.

However, Prosser's language is not to be taken as a limit on the concept of libel by implication. Rather, the discussion of juxtaposed or omitted words is merely used by way of example, not as a mandate. Prosser understood that libel by implication arises because words always must be examined in their context and examined as a whole. (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1131; Smolla, The Law of Defamation, *supra*, § 4.05[1], p. 4-18.2 & fn. 54; Rest.2d Torts, *supra*, § 563, pp. 163-164 coms. c & d.) In determining if there is a libel by implication, "the expression used as well as the 'whole scope and apparent object of the writer' must be considered...." (*Forsher v. Bugliosi, supra*, 26 Cal.3d at p. 803, citing *MacLeod v. Tribune, supra*, 52 Cal.2d at p. 546.) To determine if the words or presentation were manipulated to create a false implication, a specific method of manipulation is not required.[15] Therefore, contrary to the

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[15] Citing *Francis v. Dun & Bradstreet, Inc.* (1992) 3 Cal.App.4th 535, 540 [credit report is not actionable because report was accurate], *Lee v. Columbian Inc.* (Wash. App. 1991) 826 P.2d 217 [defamatory meaning cannot be imputed to true statements], *Herbert v. Lando* (2nd Cir. 1986) 781 F.2d 298, 312 [overall impact of publication same as defamatory implication conveyed by individual statements, which are themselves not actionable] and *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1161, the News-Press contends the implication is not actionable. In the cases relied upon by the News-Press, the inferences were not actionable because they were identical or subsumed in that which was expressly stated. The News-Press then argues the inference here was not actionable because it was identical to the explicit statement contained in item 1, the chronology box. However, the inference (item 5) and item 1 both were found to be

News-Press's suggestion, libel by implication does not contain the restrictions it proposes.[16]

f. *The Implication Found Libelous Was Actionable.*

The News-Press contends the inference was not actionable because "it is evident that the enormous verdict by the jury was based on its belief that [the News-Press's] articles made [Ross] look like a 'crook' [and such conclusions are not provably true or false.]" This contention is not persuasive because it was not "'evident" the jury's verdict was based upon the unactionable inference Ross was a "crook."

2. CONTENTIONS BY ROSS

a. *We Find the Jury's Special Verdict Was Internally Inconsistent.*

Ross contends the trial court erred in granting a new trial because the verdict was not internally inconsistent. This contention lacks merit.

(1) *Applicable Law.*

Code of Civil Procedure section 657 permits a trial court to grant a new trial when the verdict is "against law." (Code Civ. Proc., § 657, subd. 6.) While this ground for a new trial is in the same subdivision as that which permits the trial court to grant a new trial for "insufficiency of the evidence,"

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false, it is just that item 1 was found not to have caused damages. The confusion pointed out by the News-Press (that the inference was found to be false and to have caused damages, whereas item 1 was found to be false but not to have caused damages), demonstrates why the jury was inconsistent. It does not demonstrate the implication was not actionable.

[16] The News-Press has not cited California cases which hold to the contrary; its citation to authority from other states is not controlling.

the two are distinct, alternative grounds. (*Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 382-383.)

"When we say that the evidence is insufficient to justify the decision, we mean that there is an absence of evidence or that the evidence received is lacking in probative force to establish, the proposition of fact to which it is addressed. [Citation.]: 'An orderr granting a new trial on the ground that the verdict [decision] is against law cannot be sustained by merely showing that it is unsupported by the evidence.' [Citation.]" (*Renfer v. Skaggs, supra*, 96 Cal.App.2d at p. 383.) "A decision can be said to be 'against law' within the meaning of Code of Civil Procedure section 657, subdivision 6, where the findings are irreconcilable." (*Campbell v. Zokelt* (1969) 272 Cal.App.2d 315,3 18.) "Where the findings are so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined, the decision is 'against law.' [Citation.]" (*Renfer v. Skaggs, supra*, 96 Cal.App.2d at p. 383.)

"The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence. The rule finds parallel expression in the law relating to court findings: 'Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.' [Citation.]" (*Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 101.)

(2) *Discussion.*

(a) *Inconsistency between Item 5 and Item 4.*

Here, the trial court found the verdict was inconsistent because the jury's finding that item 5 was false (that the first

article created the false implication "that [Ross] was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison"), was irreconcilable with its finding that item 4 was not false ("The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Martin as a result of the allegations").

As three trial court explained, the reference in item 4 to "the allegations" had to have pertained to the immediately preceding paragraph, of the second article, which read: "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud. Investors who participated in real estate syndicates formed by Ross and a partner, Barry S. Marlin, almost 20 years ago claim that they were defrauded of millions of dollars." The term "the allegations" had to have referred to allegations of fraud for which Marlin was eventually incarcerated.

It is impossible to reconcile these two findings, which were arguably identical. It is impossible to tell how the underlying material issues were determined. The trial court found that Item 5 and Item 4 state the same thing. Each refer to governmental investigations of Marlin and Ross and thus, the findings of the jury were inconsistent.

Ross contends the verdicts can be explained because item 4 was found in the second article, whereas the three specific items found to be false (items 1, 2 and 3) as well as the inference (item 5) were contained in, or inferred from, the first article. However, in making this argument, Ross neglects the obvious. Both articles stressed the connection between Marlin and Ross and neither article differentiated between the 1972 - 1974 investigation and the 1976 investigation. Further, the

inconsistency is based upon content, not when the statements were made. Thus, the distinction Ross makes is insignificant.[17]

(b) *Inconsistency between Item 5, and Items 1 and 3.*

Even if, as Ross contends, the verdicts are not internally inconsistent with regard to the findings on item 5 and item 4, another ground supports the new trial order: the jury's verdict was inconsistent when it found item 5 (the inference) caused damages, whereas it found items 1 and 3 were false, yet they did not *cause* Ross's damages.[18] Since the *content* of these items was arguably substantially similar, if damage flowed from one, damage had to have resulted from the others. Thus,

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[17] Ross notes the jury answered "No" to the question "Has [Ross] proved by a preponderance of the evidence that the tone and tenor (the implication) of the February 28, 1988 article is that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison?" He then argues this finding buttresses his argument that the jury looked differently at the two articles. Even if the jury might have concluded the second article, as a whole, did not leave the same false impression as the first article, it does not eliminate the fact that neither article differentiated between the two investigations.

We summarily reject Ross's argument the new trial order cannot be affirmed because the trial court misread the verdict. Although the trial court's order incorrectly stated item 4 was the chronology box, the context of the order as well as its subsequent oral statements clearly demonstrate the trial court made a clerical error. We also reject Ross's argument that any possible inconsistency was not prejudicial to the News-Press.

[18] Although the trial court did not explicitly consider this as a reason for granting the new trial, we may affirm on these grounds. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905 ["[Code of Civil Procedure] section 657 requires an appellate court to affirm a new trial order if it should have been granted on any ground stated in the motion. However, an appellate court cannot affirm on grounds of insufficiency of the evidence or of inadequate or excessive damages unless such ground is stated in the new trial order."].)

these findings are internally inconsistent and cannot be reconciled.

Item 1 was taken from a sidebar item captioned "A Ross Chronology." It stated: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission." Item 3 stated: "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

Ross admits item 1 and item 3 "could not, by their nature, be related to the 1972 investigation of [him] for extortion. . . ."

If Ross was damaged because the News-Press falsely accused him of being investigated by governmental agencies for the fraud which sent Marlin to prison, Ross also had to have suffered damages by the false statement that specific agencies (the FBI, the federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission) investigated him. Item 1 is merely a more specific statement regarding the governmental investigation.

Additionally, if Ross was damaged because the News-Press falsely accused him of being investigated by governmental agencies for the fraud which sent Marlin to prison, then he had to have suffered damage by the false statement he was investigated by a number of law enforcement agencies for alleged fraud.

Ross contends these findings are not inconsistent because finding item 5 (the inference) caused him damages was proof that the "cumulative" effect of the articles caused

him harm.[19] However, this argument presumes there was damage from the other items, as otherwise there is nothing to accumulate. If there was no damage from the other articles, there was nothing to accumulate.[20]

Thus, it is impossible to determine how a material issue was resolved and the verdict was internally inconsistent.

b. *We Are Not Mandated to Address the Evidentiary Issues Raised by Ross.*

Ross requests that we address numerous evidentiary rulings made by the trial court.[21] In that these issues may not arise upon retrial, are not issues of law (cf. Code Civ. Proc., § 43) and are not necessary to the disposition of the matter, we believe they are best left to the trial court. (Cf *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 646-647.)

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[19] Ross also attempts to explain these verdicts by suggesting the jury merely wanted to prevent "unwarranted double recovery for the same injuries." By this argument, Ross is admitting the facts contained in item 1 and item 3 were substantially identical to the inference:

[20] In light of our conclusion the verdict was inconsistent, we need not address excessive damages, the other grounds for granting the new trial. Further, in light of this ruling, it would be inappropriate to conclude Ross was entitled to a remittitur and it would be inappropriate to affirm the reputation damage award.

[21] Ross questions the trial court's rulings which (1) excluded evidence of his special damages, (2) excluded evidence of what local residents and savings and loan customers said about him after the libel was published, and. (3) precluded him from discovering and proving what state savings and loan regulatory officials thought of him, and what they said to him and his attorney, after publication of the libel.

DISPOSITION

The order denying judgment not withstanding the verdict is affirmed. The order granting new trial is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KLEIN (Brett), J., concurring and dissenting:

I agree that the new trial order was correct. I write separately to express the view that defendants were also entitled to judgment notwithstanding the verdict, for two distinct reasons. First, the correction demand was insufficient. Second, plaintiff failed to prove that any damages were caused by the implication the jury found actionable.

1. *The Retraction Demand Was Insufficient, and Plaintiff Suffered No Special Damages.*

A retraction demand is "a written notice specifying the statements claimed to be libelous and demanding that the same be corrected." (Civ. Code, § 48a, subd. 1.)

The California cases teach that this statutory requirement is to be generously construed in favor of plaintiffs, but not to the point of obliteration. Thus in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, an unspecific retraction demand was deemed adequate where the newspaper article contained but a single reference to plaintiff. Similarly, in *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 31, a demand for correction of "every statement concerning the conduct of [plaintiffs] children" was held sufficient to inform the publisher what corrections were demanded. By contrast, in *Gomes v. Fried* (1982) 136 Cal.App.3d 924, a newspaper published a captioned photograph implying plaintiff sleeps on the job, accompanied by an article making numerous other disparaging comments about his work performance. Plaintiffs correction demand specified certain disparaging comments, but did not mention the photograph or its caption. This was held an insufficient demand for retraction of the defamatory implication that he sleeps on duty.

The correction demand in the present case was even more inadequate than the demand in *Gomes v. Fried.* Here, the

first article stated over 200 facts about plaintiff. Plaintiff's burden was simply to inform the publisher which facts should be corrected. Instead, his retraction demand letter, signed by counsel, complained at length that defendants should have written what they had been told by plaintiff not what they had heard from other sources or seen in court documents. Then plaintifff quoted 22 passages he said were false, misleading, or libelous, complained that these passages portrayed him in the worst possible light, and demanded that defendants "correct and retract the above-specified statements, collectively as well as individually."

This letter, though over 1500 words long, did not complain that the article stated or implied that the government had investigated plaintiff for the frauds for which Marlin went to prison. It did not request that defendants publish a correction clarifying that such was not the case. Indeed, only one of the 22 passages mentioned a government investigation: "Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law enforcement agencies, ..." (Ellipsis in original.)

A retraction demand must tell the publisher what statements are complained of, so that the publisher can decide whether to print a correction. The demand need not satisfy the "niceties of common law pleading." (*Kapellas v. Kofman, supra*, 1 Ca1.3d at p. 31.) Plain English will suffice. All plaintiff had to write was, "Your article incorrectly implies that the government investigated me for the crimes that Marlin committed. Please print a correction saying that this was not so."

Instead, plaintiffs grapeshot retraction demand gave the publisher no inkling what plaintiff was requesting. Perhaps plaintiff had no idea either. The rambling retraction letter is attached as an appendix to this opinion, along with both newspaper articles. Essentially, the retraction letter said this:

'Your article makes me look bad. Here are 22 things in the article which I did not like. Please retract the entire article and write a more favorable one, in which you give less emphasis to my past, and more to the time and effort I have devoted in more recent years to cultivating an upstanding reputation through my devotion to charitable causes.'

A person claiming general damages from a defamatory newspaper article or radio broadcast must make a better retraction demand than this. If this retraction demand was adequate, then let newspaper publishers beware the retraction statute no longer applies to long pieces of investigatory journalism.

Because his retraction demand was insufficient, plaintiff should be limited to recovery of provable special damages.

It could serve no purpose here to explain in detail the shortcomings of plaintiff's offer of proof of his special damages. His special damages evidence was mere gossamer.

In a defamation case, a plaintiff must adduce sufficient evidence that the defendant's wrongful conduct produced the harm for which he seeks recovery. As the rule was restated in *O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1113, where there was evidence the defamation caused a disabling, professionally diagnosed psychiatric illness, "Two limitations apply to special damages: (1) they must be proved to a reasonable certainty; and (2) no special damages are recoverable if they are deemed remote." In this respect, plaintiff's claim -- that but for the libel he would have rescued Santa Barbara Savings and Loan Association from its financial crisis -- is reminiscent of the election libel cases, in which an unsuccessful candidate claims the libel cost him the election. Whether a plaintiff would have won an election absent the libel

is regarded as too speculative to permit recovery. (*Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 635-636.)

Because the insufficiency of the retraction demand barred general damages, and plaintiff had no proof of special damages, judgment should be entered in favor of the defendants.

2. *The Evidence Does Not Support the Finding That the Government-Investigation Implication Caused Plaintiff's General Damages.*

Plaints proof of damage to his reputation and psyche was devoid of substantial evidence that this harm was caused by an implication that the government investigated him for the frauds for which Marlin went to prison, rather than by all the derogatory information contained in the first article. The article revealed a terribly damaging truth about plaintiff's background: he got his start in business as partner of a man who perpetrated a Brobdingnagian swindle, and as a result investors had accused plaintiff of defrauding them of millions of dollars. In contrast the implication the jurors found actionable pertained to one small aspect of plaintiffs relationship to Marlin and to the Willow Ridge pyramid.

In this regard, it should be noted that the trial court rejected defendants' offer to prove that plaintiff had a poor reputation before these articles appeared. The excluded evidence was that the great bulk of the facts reported in the articles was true; that plaintiff had a reputation for dishonesty in business, for outrageous litigiousness, and for a capacity to bribe government agents to avoid prosecution; that plaintiff did indeed engage in fraudulent business activities with Marlin; that FBI agents and a federal judge familiar with Marlin's prosecution were shocked that plaintiff was not prosecuted too; and that the SEC and the District Attorney of Los Angeles County investigated plaintiff for investor fraud -- in sum, that

plaintiff was known as a shark, if not a Marlin. Exclusion of this evidence tainted the jury's finding that plaintiff's reputation was damaged by the government-investigation implication. (See *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 fn. 11 [when sued for damage to reputation and emotional well-being, a defendant may adduce evidence that the plaintiff "did not have as good a reputation in the business community as his testimony tended to show"].)

Thus plaintiff failed to prove that any harm to his reputation and psyche was caused by the implication that the government investigated him for the frauds which landed Marlin in prison, rather than by the content of the articles in general.

For each of these two reasons, I would order entry of judgment in favor of defendants.

KLEIN (Brett), J.*

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* Judge of the Municipal Court for the Los Angeles Judicial District, assigned by the Chairperson of the Judicial Council.

Second Appellate District, Division Three, No. B082419
S061098

IN THE SUPREME COURT OF CALIFORNIA

LEONARD M. ROSS, Appellant

v.

NEW YORK TIMES COMPANY Et Al., Respondents

Appellant's petition for review DENIED.

Mosk, J., and Chin, J., are of the opinion the petition should be granted.

/s/ George
Chief Justice

[FILED JUN 11, 1997]

Santa-Barbara News-Press
February 28, 1989

Rosses drop bid to buy S&L stock

By Kathleen Sharp
News-Press Business Writer

The largest shareholders of the Financial Corporation of Santa Barbara have abruptly withdrawn their application to buy a larger position in the troubled company.

The move by Leonard M. Ross and his wife, Merri Jean, came earlier this month after six months of waiting for regulators to approve their request regarding Santa Barbara Savings and Loan, the primary subsidiary of Financial Corp.

The couple own 9.9 percent of the company's outstanding stock. They were seeking permission to increase their holdings to as much as 24.9 percent.

Such a large stock position would have allowed the Rosses to have a seat on the board and voice in the future of the savings and loan.

Ross, a Beverly Hills real estate investor who owns a Montecito residence, did not return two phone calls Monday afternoon. His attorney, Howard L. Weitzman, hung up on a reporter after he was asked for a comment on the withdrawal.

George Wright, an attorney for the California Department of Savings and Loan, said the Rosses had given no explanation for their sudden move. He said it came three days before the state department was scheduled to decide on their application.

"Time had almost expired for us to make a decision," said Wright. "We had to either approve it or deny it."

Last month the regulatory agency was planning to approve the couple's application on Feb. 7. Commissioner William Crawford told the News-Press that, despite numerous allegations against Ross, the law required regulators to presume that applicants were innocent of wrongdoing until proven otherwise.

"I don't like it, but that's the way it is," Crawford said.

In the last year, California regulators have been dogged with failed thrifts, including the nation's second largest – Financial Corporation of America. As a result, regulators have been particularly sensitive to any changes in an institution's operations, regulators have said.

As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud. Investors who participated in real estate syndicates formed by Ross and a partner, Barry S. Marlin, almost 20 years ago claim that they were defrauded of millions of dollars.

The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations.

Marlin was convicted in 1978 of fraud, but Ross has never been charged with a crime or convicted of any wrongdoing.

In an interview in October, Ross denied any wrongdoing and said the allegations have hurt him and his family deeply. He said his interest in Santa Barbara Savings and Loan had been for investment purposes only.

However, the stock has not been profitable of late. It has dropped from a high of $8.75 in August 1987, when the Rosses first started buying large amounts of stock, to about $2.87 this week.

Last week, the company stopped paying cash dividends on common stock to save $600,000 annually.

Earlier this year, Philip R. Brinkerhoff, chairman of the thrift company, announced that the thrift would post an estimated $7 million loss for 1988. He also said the company planned to lay off 25 people by the end of March, and to slash executives' salaries by as much as 10 percent.

Brinkerhoff said the cost-cutting moves were necessary to regain profitability at the thrift, which remains the largest financial institution headquartered in Santa Barbara County.

Santa Barbara News-Press
November 27, 1988

S&L investor: Inquires, suits mark career

By Kathleen Sharp
News-Press Business Writer

Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law-enforcement agencies, is seeking to increase his stake in Santa Barbara Savings and Loan Association's parent company to almost 25 percent of outstanding shares.

Ross has collected at least $20 million in damages during the past several years in lawsuits against insurance companies – all in the process of defending himself against fraud charges filed by investors in real estate syndicates he helped to form almost 20 years ago.

His partner in those ventures, Barry S. Marlin, was convicted in 1978 of defrauding investors of more than $43 million, and served a prison term. Ross has never been charged with a crime or convicted of any wrongdoing, despite the many investor lawsuits and allegations by Marlin and two of Ross' former attorneys that he threatened them.

Ross, who owns property in Montecito and spends part of his time there, vehemently denies any wrongdoing, saying he is being unfairly tainted by Marlin's problems. He specifically denies threatening anyone, and says he severed his relationship with Marlin before any illegal activities occurred.

State savings and loan regulators are reviewing the application by Ross and his wife, Merri Jean, to increase their holdings in Financial Corporation of Santa Barbara. They are

already the largest shareholders in the parent company of Santa Barbara Savings, which has been troubled in recent years.

The California Department of Savings and Loan and the Federal Home Loan Bank Board must approve such applications. The federal board approved the Rosses' application quickly. A spokesman for the board said the promptness was in part because the couple filed a statement saying they did not intend to control the operations of the company, but merely wished to invest in it.

But in the wake of three major California thrift insolvencies this year, state regulators are taking a closer look at the Rosses' application. "We are taking more time with this one," said George Wright, an attorney for the Department of Savings and Loan.

The department must either act soon on the application, or ask for more time. The Rosses submitted their application three months ago.

"We can't turn them down on allegations," said William Crawford, commissioner of the state S&L department. "We are looking for substance," he said.

The News-Press has spent three months researching court documents and transcripts of federal proceedings involving Ross. He has been investigated by the Federal Bureau of Investigation, the Organized Crime Strike Force and a federal grand jury concerning his business relationship with Marlin. But Ross was never indicted or charged with any crime.

In an interview last month, Ross said he was not involved in the swindle that sent this partner to prison.

Ross, an attorney, does not practice law, but describes himself as a real estate investor. He lives in the former home

of Marion Davies and William Randolph Hearst, a $25 million mansion in Beverly Hills. Ross and his family spend some time in Montecito, where they have purchased two properties, according to broker Alexander Velto.

He has hired a battery of attorneys to represent him in dozens of lawsuits, some filed against him, some by him. Most are tied to the Marlin partnership.

Among the attorneys he has retained is Howard L. Weitzman, who successfully defended John DeLorean in a highly publicized federal cocaine "sting" case and is representing heavyweight boxing champion Mike Tyson in his divorce case.

Ross has sued one of his former attorneys, Lynn Stites, who in turn sued Ross. In his suit, Stites claimed that Ross tried to murder him. Stites' suit was recently dismissed by the Ninth U.S. Circuit Court of Appeals, where Ross' suit is still pending.

In court documents, Marlin has accused Ross and his associates of kidnapping and pistol-whipping him, and coercing him into signing damaging statements.

Another of Ross' former attorneys, Richard Osborn, has signed a declaration saying that Ross threatened to harm Osborn if he didn't alter his testimony in connection with one of the lawsuits involving Stites.

Stites and Marlin also say Ross has threatened their families.

"That's absolutely false," said Ross, referring to the Stites, Marlin and Osborn charges. "I would never dream of doing any such thing."

In dismissing the allegations, Ross pointed out that Marlin is a convicted felon. He said Stites is trying to make a disagreement over fees "into something more than that." And he said the accusation by Osborn was "shocking."

Ross has settled the investors' suits against him, which sought to recover at least $43 million lost in real estate investments. To settle some cases, Ross made claims on his insurance policies, some of which insured the investment properties for damage and negligence.

Because investors claimed they were damaged, Ross was able to use the policies to pay for his court defense and settlements. He says that in some cases, insurance companies made settlements against his wishes. He said he would have preferred to continue the suits to clear his name.

When many insurance companies refused to pay for Ross' defense, Ross sued them for breach of contract. He has been very successful in those suits. Many of the insurance-suit settlements have been kept confidential, and Ross declined to disclose the amount he has collected. But two of his former attorney say in court documents that Ross has pocketed more than $20 million in damages.

"Ross has sued every insurance company in the state of California for bad faith and has collected $15 million to $20 million" in damages, said another attorney, John Endicott.

Endicott, an attorney at one of the state's most prestigious firms, Gibson Dunn & Crutcher, represented another set of investors who sued Marlin, Ross, and others to reclaim money from the bankrupt real estate partnerships.

Attorneys for insurers declined comment for this story.

The insurance suits are among those the state S&L department is reviewing before approving the Rosses'

application to acquire up to 24.9 percent of the shares of Financial Corporation of Santa Barbara.

The Rosses already are the largest shareholders of Santa Barbara Savings. In the last 14 months, they have paid $3.5 million to purchase 604,200 common shares, or 9.9 percent of the savings and loan association's outstanding shares. The stock closed Friday at 2¾.

They are seeking approval to acquire 904,442 more common shares, which would bring their holdings to 24.9 percent. At Friday's price, they would pay about $2.5 million if they decide to increase their holdings by the full amount applied for.

"I might buy, I might sell, I might increase (my) position," said Ross. "It depends on market conditions and a number of things," he said. "You should not jump to the conclusion that approval automatically will result in my purchase of additional stock," he said.

At the 25 percent level of ownership, an applicant is presumed to be in control of an institution and involved in the S&L's affairs, said Lorna Thompson, a spokesperson for the Federal Home Loan Bank Board.

But in their federal application, the Rosses signed papers rebutting the presumption of control, and so are considered to be passive investors. But if the Rosses decide to purchase the maximum amount of shares allowed, they would be entitled to appoint one director to the board of Santa Barbara Savings.

Despite their declaration as passive investors, under state regulations, the Rosses would hold what is considered to be controlling interest in the S&L, said Wright, an attorney with the S&L department.

As a result, state regulators are scrutinizing the Rosses' application more thoroughly than federal regulators. We don't take the application at face value," said Wright.

Regulators in today's embattled savings and loan industry are especially sensitive to changes in control. Since this summer regulators have closed down two insolvent institutions in Orange County - American Diversified Savings Bank and North America Savings and Loan – and paid $1.38 billion to depositors. The nation's second-largest thrift, Financial Corporation of America in Irvine, was taken over by regulators after it became insolvent.

"Obviously, we've had some high-fliers who. . . have been too reckless with people's money," said Wright. "We are trying to protect the public and the associations from further losses."

Added Commissioner Crawford, "We got people in the industry we didn't want and we don't want to let that happen again."

"But, at the same time, we can't be capricious" about the approval process, he said.

Ross said he is interested in Santa Barbara Savings only as an investment. "I think there are good points and bad points about the company. Only time will tell which takes precedence," he said.

He owns stock in other thrifts, including Imperial Corporation of America, based in San Diego. But his holdings in Santa Barbara Savings, which lists $5 billion in assets, is his largest stake in a publicly held thrift, he said.

What follows is a profile of Ross based on court documents, and interviews with Ross and dozens of attorneys, analysts, regulators and investors:

Leonard Ross was born in New York 44 years ago, the middle of five children. When he was 16, Ross' father, a cab driver moved the family to Los Angeles. Leonard went to Fairfax High School and UCLA. As an undergraduate, Ross studied business. As a UCLA law student, Ross studied tax law and was graduated first in his class in 1968.

In late 1968, Ross met Barry S. Marlin. Impressed with Ross' abilities in tax law, Marlin suggested the two become business partners, said Ross.

Marlin & Ross Inc. was formed in early 1969. The firm sold a number of investments and services, including real estate limited partnerships in medical office buildings, apartment complexes and shopping malls. If the investor wished he or she could borrow money through Marlin & Ross which had set up agreements with banks for this reason. The two partners called it the "No Cash Investment Program."

"To say there is absolutely no risk of loss in any investment is a foolhardy statement," read one Marlin & Ross Inc. marketing brochure. "In our opinion, however, the firm's approach to real estate investment definitely maximizes the safety of the principal."

Lawyers for investors alleged in court documents that both Ross and Marlin diverted more than $2 million from one of the business entities, International Monetary Fund (IMF). The fund collected investors money and invested the money in the foreign currencies.

Investors claim that Marlin diverted another $600,000 without Ross' knowledge. In May 1971, Marlin said Ross confronted him about the missing money. In court documents, Marlin alleged that Ross, his brother Al Ross, and two men with past criminal records, Robert Clark and Walter Seifert, kidnapped Marlin and took him to Leonard Ross' apartment.

They held Marlin overnight while reviewing the firm's books and threatened him, Marlin said in court documents.

Marlin said in deposition filed in court that a month later, in June 1971, Ross called Marlin to his office and accused him of liquidating property without his knowledge. Al Ross, Clark and Seifert were present, Marlin said.

While Leonard Ross yelled questions and accusations at him. Seifert pistol-whipped and beat him, Marlin alleged in the court documents.

Marlin said that he was bleeding, dizzy and nauseated when Stephen Landau, an attorney who worked with Ross, burst into the room and asked what was going on.

In a recent interview, Landau said, "I heard screaming and yelling, and saw Al (Ross) standing over Marlin with a gun." Landau said he saw some papers in front of Marlin before Landau was picked up and carried out of the room by Al Ross, who told him to mind his own business.

Marlin contends that at that meeting, he was forced to sign several damaging documents, including one that turned over his part of the business to Ross.

Investor lawsuits claimed that during Ross' tenure as sole owner, another $1.2 million was discovered missing from investor accounts.

In September, Ross asked Marlin back in, then dropped out of the business, Ross has claimed in court Marlin said in court documents that under duress, he agreed to buy the business back from Ross for $4.65 million.

For about the next five years, Marlin continued operating the business and tried to save investors' money, he said.

Ross formally severed his business relationship with Marlin in September 1971, he said. Marlin paid Ross $125,000 to $150,000 every quarter until about the middle of 1973, according to court documents.

But Marlin had trouble meeting the payment schedule. He asked Ross if he could renegotiate and settle for $1 million.

Marlin said that to persuade Ross to settle, he hired Buzzy Rivkin, an employee of Caesar's Palace in Las Vegas, and two of Rivkin's associates. They were Raymond "Rocky" De Rosa and Eli Lubin, who as an FBI informant, according to court records.

According to court documents, the men contacted Ross and arranged a meeting in October 1972 between Marlin and Ross, at which Ross told Marlin he wasn't interested in settling for $1 million.

Marlin eventually paid Ross $1.8 million and agreed to sign over Commerce Square Shopping Center which was worth an estimated $800,000 and belonged to Marlin's investors, according to court records. Marlin told the court that he consented to Ross' demands because Marlin feared for his life.

In 1973, Ross testified before a federal grand jury, repeatedly invoking the Fifth Amendment protection that forbids requiring someone to testify against himself when asked about his business associations with Marlin. Ross said he did so on the advice of his attorneys, and no indictment was returned against Ross.

The FBI investigated Ross, but that investigation did not result in a prosecution.

The FBI refused to discuss its investigation after the News-Press obtained a copy of FBI reports in the case, which were entered as evidence in some of the civil suits.

In January 1977, investors filed suit in U.S. District Court against Marlin, Ross and other parties. The case, named after investor Herbert Goodrich, sought damages for losses to be proven in court plus $50 million in punitive damages. Investors also claimed that Ross was a known participant in the fraud from January 1969 to September 1971 and an undisclosed participant from September 1971 through April 1976.

Marlin claimed in court that when Ross left Marlin in September 1971, Ross drained the assets from the real estate investment venture, leaving it virtually insolvent.

Marlin said he then started selling property he didn't own, creating addresses that didn't exist, creating certificates of deposits in banks that didn't exist and using these non-existent entities to attract more investors. "What he was trying to do was rescue a situation and save investors' money," said Marlin's attorney, Alan Arnold.

"In his efforts, he ended up doing things that were downright illegal," Arnold said. Marlin is currently living with his family outside of London, said Arnold. The attorney declined to allow his client to be interviewed by the News-Press.

In September 1977, after 15 months of investigation by the Securities and Exchange Commission, the U.S. Post Office and the Internal Revenue Service, a federal grand jury returned a 211 count indictment against Marlin.

Marlin pleaded guilty to six counts, including fraud. In April 1978, Marlin started serving a 10-year sentence at Terminal Island prison off San Pedro. He actually served on 30 months after he agreed to give evidence in an FBI investigation involving political corruption in New Jersey.

Tom Nolan, the assistant U.S. attorney who prosecuted Marlin, said there was insufficient evidence to prosecute Ross.

"Mr. Marlin's version of the events were available for his defense, but he didn't use them," said Nolan. "He pled guilty to charges."

Ross has consistently maintained that he was innocent of any wrong that sent his partner to prison.

"I'm not mentioned in the indictment and I had nothing to do with it. The U.S. attorney knew that and Marlin was blaming others (for his problems). I was one who he tried to blame," said Ross.

Asked about the pistol-whipping incident related in court by Marlin, Ross said "Anything along those lines is absolutely false. If that were true, there would have been some government action taken."

Ross attorneys say that Ross has suffered enough from two decades of fighting lawsuits that never should have been filed in the first place.

I think it's unfortunate . . . after all of that, you would think (Ross) can walk away with his head held high and not be hounded by questions (related to events) 20 years ago, which . . i are so specious as to be a joke," said Dale Kinsella, an attorney representing Ross.

In November 1983, Ross and Robert Keilly, who worked for Ross, settled the Goodrich case by paying $1.5 million from insurance policies. About 98 percent of the settlement money came from Ross' general liability insurance policies. By settling, Ross did not admit any wrongdoing.

In 1976, some of the real estate partnerships were placed under the protection of Chapter 11 of the federal

bankruptcy code. Eighteen of the limited partnerships were consolidated into one bankruptcy case that was called A&C Properties, after some of the properties. The case has been in court for the past 12 years.

In 1979, the 18 limited partnerships were declared bankrupt, and the court appointed a trustee, Gilbert Robinson. Robinson hired a law firm to sue Marlin, Ross and others in state court to recover money for investors of the bankrupt partnerships.

Investors claimed fraud, damage to property and improper conduct by he people soliciting the investments, said Arnold. This case came to be known as Willow Ridge after an address of one of the properties in the limited partnerships.

Last summer, all the assets of the partnerships were liquidated and converted to $21 million said Richard Diamond, who represents the trustee. There are about 1,500 claims on the assets. But there are no records to secure claims and to help distribute the money in an orderly fashion, said Diamond.

The attorneys are trying to figure out how to satisfy $34 million in claims with only $21 million in cash. One of the claimants is the Internal Revenue Service.

At one point during the bankruptcy proceedings, Ross and the trustee formed an agreement that if one of the parties recovered money from insurance companies, the two parties would split the proceeds so that Ross would get 70 percent and the creditors 30 percent.

Despite that agreement and several others negotiated between Ross and the trustee, the division of funds obtained from the many insurance settlements was disputed.

"Under our view, we were supposed to have gotten $8 million (more) for investors," said Diamond. But Ross disagreed, and the matter ended up in court.

The bankruptcy trustee recently got $7 million and paid Ross $1 million. "We have finally rid ourselves of Leonard Ross," said Diamond.

It is already one of the longest bankruptcy cases in history, claimed Diamond. "It will probably go on a few more years," he said.

Throughout most of the Goodrich and Willow Ridge cases, Ross was defended by Lynn Stites and Richard Osborn. The two attorneys sued Ross' insurers, who refused to defend Ross in suits alleging damage and negligence from real estate investments.

In a lawsuit filed in U.S. District Court in 1985, Ross claims that Stites tried to defraud Ross by striking secret agreements for fees with insurance companies that were obligated to defend Ross in Willow Ridge.

Ross is suing Stites for fraud and breach of contract. The case is pending in the Ninth U.S. Circuit Court of Appeals.

For his part, Stites sued Ross, accusing Ross of creating a pattern of racketeering and fraud. That suit was dismissed in November by the court.

Stites claimed that Ross tried to "extort (funds) by treats of death, murder, kidnapping, and mayhem" against Stites and his family.

In a pleading uncommon in civil suits, Stites accused Ross of hiring assassins to murder him.

Stites claimed that in February 1987, he was driving to give a deposition in connection with a Ross case. A man described as a valet parking attendant drove a car into Stites, crushing his legs and leaving him bleeding on the floor of a Century City parking garage. The parking attendant was never found, said Arnold.

Stites did not return a number of phone calls during the course of three months.

Ross' attorney, Kinsella, said the accident was a coincidence. He explains that according to the accident report, rainy weather that day caused the parking attendant's foot to slip and step on the accelerator rather than the brake. Stites was taking his briefcase out of his trunk when the attendant accidentally rammed a car into a parked car whose engine was running and which then hit Stites.

The Goodrich case has been settled, and the Willow Ridge case is still pending but Ross is no longer involved in it. Ross said he wishes that he had been vindicated in those suits.

The insurance settlements paid on his behalf were against his wishes, Ross said. Ross said he was forced to agree to the settlements because a policy provision stated that if he didn't consent to settlement, he would lose the benefit of defense. "So be it," he said.

Insurers wanted to cut down on defense costs and so preferred to settle the cases, rather than allow Ross to defend himself and clear his name which may have taken years, said Ross. Insurers reasoned that by settling, they would exhaust their policy limits and not have to defend Ross further, he said.

These days Ross can see the light at the end of the litigation tunnel. "It's all behind me. There's no investor

litigation (left). There's never been any judgment against me and the bulk of the litigation now (pending) is Stites," he said.

"The proper thing to do, I would think, so as not to destroy my life, my family's life or reputation. . . is to forget about it."

A Ross Chronology

1968 ▶ Leonard M. Ross graduates first in his class from UCLA law school.

1969 ▶ Ross forms a business with Barry S. Marlin called Marlin & Ross, which sells real estate syndicates and partnerships.

1971 ▶ Marlin alleges that Ross kidnapped him, forced him out of business, then asked him back. A few weeks later, Marlin buys Ross out.

1972-1976 ▶ Marlin and Ross are investigated by he FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission.

1976 ▶ Marlin's real estate business runs into difficulties, and Marlin puts the business in Chapter 11 bankruptcy. The case is still pending in U.S. Bankruptcy Court, and spawns an investor case that comes to be known as the Willow Ridge case.

1977 January ▶ Marlin, Ross and others are named in a class action suit by 1,460 investors claiming $43 million in losses from real estate investments in a case that was called Goodrich, after one of the investors. In 1983, Ross settles the case, which was closed in August 1988.

1977 September ▶ A federal grand jury returns a 211-count indictment against Marlin. Ross is not indicted.

1978 March ▶ Marlin pleads guilty to six counts including fraud. In April, he begins serving a prison term at Terminal Island, near San Pedro. He serves 30 months.

1978 to present ▶	Leonard Ross sues a number of insurance carriers for breach of contract and bad faith for not agreeing to defend him in certain real estate-related lawsuits against him. Some carriers have suits against Ross. Some suits were settled in Ross' favor; others are still pending.
1983 November ▶	Ross settles the Goodrich case without admitting any wrongdoing. He and Robert Keilly, who once worked for Marlin & Ross, pay $1.5 million from insurance policies.
1985 ▶	Ross sues his former attorney, Lynn Stites, alleging racketeering and fraud. Case is pending on appeal.
1986 ▶	Court approves an agreement between Ross and bankruptcy trustee. Agreement becomes final in 1988.
1987 ▶	Lynn Stites files a suit against Ross alleging racketeering and fraud and attempted murder, which is dismissed in November 1988.
1987 ▶	Ross and his wife, Merri Jean, begin to purchase 9.9 percent of outstanding shares of Financial Corporation of Santa Barbara.
1988 ▶	Ross settles the bankruptcy case. Separately, the Rosses apply to federal and state regulators for permission to obtain as much as 24.9 percent of the shares of Financial Corporation of Santa Barbara.

(3)

No. 03-1338

Supreme Court, U.S.
FILED
APR 22 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SANTA BARBARA NEWS PRESS, et al.,

Petitioners,

v.

LEONARD M. ROSS,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

MISSTATEMENTS AND OMISSIONS OF FACT AND LAW IN PETITION 4

REASONS WHY THE PETITION SHOULD BE DENIED 7

I. Defendants' Feigned Confusion Over The *Bose* Rule Of "Independent Appellate Review" Is Neither Shared By Federal Or State Courts Nor Relevant To The Issue Of "Substantial Truth" In The Context Of This Case 7

A. *Bose*'s Mandate Of Independent Appellate Review Of The Issue Of Actual Malice Is Of No Moment To The Instant Issue Of "Substantial Truth" 7

B. The Cases Cited By Defendants Evidence An Absence Of Judicial Conflict, And Are Neither Relevant To The Analysis Of Substantial Truth In This Case Nor In Contravention Of This Court's Precedent 13

II. That Plaintiff's Status As A Private Figure Is Soundly Supported In Fact And Law Over Which There Is No Conflict Between the Courts 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bose Corp. v. Consumer's Union, 466 U.S. 485 (1984) ..... *passim*

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 18, 20

Connaughton v. Harte-Hanks Communications, Inc., 491 U.S. 657 (1989) 11, 12, 13

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 17

Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986) 15

Fiske v. Kansas, 274 U.S. 380 (1927) 10

Gertz v. Welch, 418 U.S. 323 (1974) ..... *passim*

Girod v. El Dia, Inc., 668 F. Supp. 82 (1987) 21

Hoffman Co. v. E.I. Dupont de Nemours & Co., 202 Cal. App. 3d 390 (1988) 22, 23

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 17

Kaufman v. Fidelity Federal Savings & Loan, 140 Cal. App. 3d 913 (1983) 20

Locricchio v. Evening News Ass'n, 476 N.W.2d 112 (Mich. 1991) 14, 15

Lundell Mfg. Co. v. American Broadcasting Companies, 98 F.3d 351 (8th Cir. 1996) 13

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 12

New York Times v. Sullivan, 376 U.S. 254 (1964) .. 7, 8, 9, 10

Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244 (1984) 17

TABLE OF AUTHORITIES – Continued

Page

Rosanova v. Playboy Enter., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) 19

Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551 (E.D. Mich. 1979) 17

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 17, 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 10, 12

Velleiux v. NBC, 206 F.3d 92 (1st Cir. 2000) 14

Waldbaum v. Fairchild Publ'n, Inc., 627 F.2d 1287 (1980), *cert. denied*, 449 U.S. 898 (1980) 19, 21

Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) 17, 18, 21

OTHER AUTHORITIES

Robertson, *In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 1999 (1976) 17

L. Tribe, *American Constitutional Law*, 645 (1978) 18

INTRODUCTION

Defendants, by their Petition, seek to convert the specific constitutional shields afforded the press into a sword with which unfettered media conglomerates can slay the good name and reputation of anonymous persons. In an attempt to constitutionalize each and every element of defamation law, be it in cases involving public figures or private figures, malice or negligence, Defendants clearly confuse well-established principles of "falsity," "knowledge of falsity," and "fault." Defendants, in claiming appellate court conflict as to the review of "substantial truth," proceed from the incorrect premise that, in all cases, there is constitutional significance to this loosely defined phrase. In short, substantial truth does not equate to truth, does not eliminate fault and does nothing to encourage or censor an accurate and responsible press. As set forth in detail below, although truth and falsity are pertinent to constitutionally mandated elements of fault, in the instant matter, substantial truth is not. After two juries and two Appellate Opinions have concluded that Defendants had negligently and intentionally published false and defamatory statements and implications, and Defendants, having made testimonial admissions that they knew, prior to the time of publication, that the defamatory statements and implications were false, this case presents no conflict for this Court to resolve.

Similarly, there is no disagreement in lower courts concerning the issue of "limited purpose public figure." The diverse case findings reached through the application of well-established factors pertinent to this analysis result from the simple, subtle and cherished fact that our society is a blend of diverse individuals. The only tactic in

Defendants' arsenal against this fact is deception in an attempt to mislead this Court.

First, Defendants agreed that neither new law nor facts justified revisiting the limited purpose public figure issue in the second trial. App. 1-2. (References to Plaintiff's Opposition Appendix are herein referred to as "App." References to Defendants' Petition Appendix are herein referred to as "Def. App.")

Although finding Defendants had waived the public figure issue on appeal, the Court of Appeal, nevertheless, addressed the issue for the second time. Def. App. 14a-18a. Defendants again tried unsuccessfully to persuade the Court of Appeal to reverse its sound decision based on a single document that had been carefully scrutinized and analyzed in both Appellate Opinions. Def. App. 14a-16a. Likewise, Defendants' new claim – that Plaintiff was poised to "control" a bank – is without support in fact. In truth, prior to publication of the false and defamatory articles, Defendants had actual knowledge that Plaintiff had filed with the Federal Home Loan Bank Board ("FHLBB"), and the FHLBB had accepted, a Rebuttal of Rebuttable Presumption of Control, ensuring that Plaintiff would have *no control of any aspect of the bank's business operations or management*. What is equally preposterous is Defendants' belief that this single false fact, if true, could, in and of itself, trump the numerous factors relevant to the issue. As set forth below, Defendants' predicate assumption is without support in law.

Defendants' tortured public figure analysis would have this Court homogenize the wide-array of figures targeted by the media so as to provide it a perfect design to defame without liability. The trial and Appellate courts,

applying the clear principles of this Court relative to the public figure issue to this factual situation, reached identical conclusions – that Plaintiff is a private figure as a matter of law. As set forth below, the questions presented by Defendants' Petition present no constitutional issue sufficient to warrant review by this Court.

STATEMENT OF THE CASE

This defamation case arises from articles Defendants published on November 27, 1988 and February 28, 1989 concerning Plaintiff. Generally, after Plaintiff applied to increase his holdings in Financial Corporation of Santa Barbara ("FCSB"), which owned 100% of Santa Barbara Savings and Loan Association ("SBSLA"), Defendants published the false and defamatory statements and implication that Plaintiff was investigated for several federal felony offenses in connection with one of the most notorious white collar crimes of the 1970's.

On October 4, 1993, the first jury returned a verdict in Plaintiff's favor, in the sum of $5,000,000 for damages to reputation, plus $2,500,000 for emotional harm. On January 14, 1994, the first trial judge granted a motion for a new trial based upon an inconsistency in the verdict and its determination that the emotional harm award (not the reputation award) was excessive. The Court of Appeal for the Second District (Division Three), on March 24, 1997, upheld the trial court as to all matters, including the finding that Plaintiff was a private figure and that any concern was created by the newspaper articles, and did not suffice to convert the general subject of the banking industry into a public controversy. Def. App. 75a.

The matter was remanded for a new trial. On January 29, 2001, the case proceeded to a second jury trial before Judge Kalin. Defendants, at the end of Plaintiff's case, moved and were granted a directed verdict on the issue of constitutional malice. Def. App. 11a-12a. After granting said motion, the court instructed the jury not to award presumed damages based on the absence of malice. The jury returned a verdict of $2,000,000 in general reputation damages and $250,000 in mental distress on March 29, 2001. Def. App. 2a

The parties again appealed. On September 28, 2003, the Court of Appeal of the State of California, Second Appellate District, Division Three, affirmed Judge Kalin's verdict in all respects, confirming that the article concerned a "public matter" and rejecting Plaintiff's argument that the Court had erred as to the availability of presumed and punitive damages under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Def. App. 34a, 37a. On January 14, 2004, the California Supreme Court denied discretionary review of this case. Def. App. 55a.

MISSTATEMENTS AND OMISSIONS OF FACT AND LAW IN PETITION

1. Defendants' statement that "Later in 1988, Respondent and his then-wife applied to the California Department of Savings and Loan . . . for approval to increase their shares in SBSL from 9.9 to 24.9 percent – a level of ownership significant enough to automatically trigger a statutory presumption of control over the institution . . ." (Petition, p. 2-3) omits the obvious. Defendants

conveniently omit that Plaintiff had filed a Rebuttal of Rebuttable Presumption of Control with the FHLBB which had been approved by the FHLBB in September, 1988, more than two (2) months prior to the publishing of the first article. App. 3-10. Plaintiff was thus never in a position of control and was never an officer or director of the institution.

2. Defendants' statement that "Although Respondent eventually acknowledged that most of the articles' statements regarding his history of legal tribulations were true or otherwise non-actionable . . ." (Petition, p. 4) is inaccurate. In fact, Plaintiff made no such acknowledgment, and although Plaintiff only proceeded against Defendants as to four specific statements, as to the implication, such implication was expressed throughout many parts of both articles that were the subject of the instant case, and it was Plaintiff's specific claim that the implication, as well as the statements, were entirely false.

3. Defendants' statement that "[T]he court reasoned that even an influential businessman or a controlling shareholder of a regulated business must thrust himself into a public controversy in order to be a public figure to any extent . . ." (Petition, p. 5) has no application as to Plaintiff. This was not the Court's reasoning as to Plaintiff. Again, as stated above, Plaintiff was never a controlling shareholder of the regulated business.

4. Defendants' statement that "[C]onsequently, it was undisputed that the SEC's investigation of the frauds that ultimately sent Marlin to prison initially included Respondent . . ." (Petition, p. 7) is completely untrue. In fact, Plaintiff introduced a huge body of evidence, testimonial, as well as documentary, including seven government

witnesses (of which Green was one), all of which was heard, weighed and evaluated by the jury, and from which the jury did conclude that no such investigation at the SEC ever took place. This evidence submitted by Plaintiff negated the existence of any such investigation and the jury, in fact, found that no such investigation ever occurred, including at the SEC. Under no circumstances could it ever be asserted that such evidence was "undisputed." Def. App. 20a-26a.

5. Defendants' statement that "In fact, found [sic] the Court of Appeal's only rationale for finding the News-Press' evidence of substantial truth insufficient to defeat Respondent's claims was 'ambiguous' and 'conflicting inferences' could be drawn from it . . ." (Petition, p. 16) is utterly false. The Court of Appeal's opinion cites considerable exception with the basic aspects of the implication, as well as the statements, which argue conclusively, and not merely as to "ambiguous" and "conflicting inferences." Def. App. 20a-26a.

6. Defendants' statement that "While this Court's decision in Hutchinson confirms that taking a leading role in a public debate may be sufficient to establish public figure status . . ." (Petition, p. 22) is unrelated to the instant case, in which Plaintiff, as a shareholder at a shareholder meeting, not even a public debate, made a few brief comments, and nothing more. He never in any way took a "leading role in a public debate." There was no controversy.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Defendants' Feigned Confusion Over The *Bose* Rule Of "Independent Appellate Review" Is Neither Shared By Federal Or State Courts Nor Relevant To The Issue Of "Substantial Truth" In The Context Of This Case.

A. *Bose*'s Mandate Of Independent Appellate Review Of The Issue Of Actual Malice Is Of No Moment To The Instant Issue Of "Substantial Truth."

In *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984), the alleged defamatory material in a public figure-malice case consisted of a statement in a magazine that the musical sound projected by Bose's speakers tended to wander "about the room." Plaintiff argued that the sound in fact tended to wander "along the wall" and introduced testimony to corroborate this latter interpretation. In approving the author's choice of words as a valid exercise of literary license, this Supreme Court held that judges in such cases have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose* at 514. Plaintiff's testimony at issue was that of the engineer who performed the evaluation for defendant in order to corroborate plaintiff's interpretation. *Id.* at 493-494. The testimony was offered as evidence of defendant's "*knowledge of this falsity.*" *Id.* at 494. (Emphasis added.) The Court, however, went on to state that:

> "There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard

> [] is fully applicable. Indeed, it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes the judgment should be entered for plaintiff. Although the Court of Appeals stated that it must perform a *de novo* review, it is plain that the Court of Appeals did not overturn the factual findings . . . , but instead engaged in an independent assessment only of the evidence germane to actual-malice determination."

Bose at 514 [citing *New York Times v. Sullivan,* 376 U.S. 254 (1964)]. In dissent, Justices Rehnquist and O'Connor precisely stated the thin thread of connection between substantial truth and actual malice:

> "The District Court concluded by what it found to be clear and convincing evidence that respondent's engineer [] had written the defamatory statement about Bose's product with actual knowledge that it was false. It reached that conclusion expressly relying on its determination about the credibility of [respondent's engineer]. [Citation omitted.] On appeal, there was no issue as to whether the district court properly understood what findings were legally sufficient to establish 'actual malice' nor was there any issue as to the necessary quantum of proof nor the proper allocation of the burden of proof

> of [actual malice]. The issue on appeal thus was only the propriety of the district court's actual conclusion that Bose had actually proved 'actual malice' in this case. Yet the Court of Appeals never rebutted the district court's conclusion that [respondent's engineer] had actual knowledge that what he printed was false. Instead, it concluded after *de novo* review that [respondent's engineer's] language was merely 'imprecise' and that as such, it would not support an inference of 'actual malice.'"

Bose at 516. The dissent went on to correlate the Court of Appeal's unclear correlation between "the *mens rea* conclusion necessary to the finding of 'actual malice' and the language used in the article." *Id.* The dissent went on to observe that:

> "The problem results from the court's attempt to treat what is here, and in other contexts always has been, a pure question of fact, as something more than a fact – a so-called 'constitutional fact.'"

Bose at 517. In dissent, Justice White, as well as Justices Rehnquist and O'Connor, observed that while the five Justices' Opinion:

> "[C]orrectly points out that in *New York Times Co. v. Sullivan*, we conducted independent appellate review of the facts underlying the 'actual malice' determination . . . *New York Times* came to this Court from a state court after a jury trial, and thus presented the strongest case for independent factfinding by this Court. The factfinding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the factfinding

> process engaged in by a trial judge who makes written findings as here. Justifying independent review of facts found by a jury . . . it is not surprising . . . that early cases espousing the notion of independent appellate review of 'constitutional facts,' such as *Fiske v. Kansas*, 274 U.S. 380 (1927), and *New York Times*, should have arisen out of the context of jury verdicts and that they then were perhaps only reflexively applied in other quite different contexts without further analysis. See *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (involving appellate review of a District Court's directed verdict)."

Bose at 518-19. Consequently, although:

> "*[T]he issues of 'falsity' and 'actual malice' in this case may be close questions*, . . . the District Court, which heard the principal witness for the respondent testify for almost six days during the trial, fully understood both the applicable law and its role as a finder of fact. Because it is not clear . . . that the *de novo* findings of appellate courts, with only bare records before them, are likely to be any more reliable than the findings reached by trial judges, I cannot join the majority's sanctioning of factual second-guessing by appellate courts. . . . [T]he primary result of the Court's holding today will not be greater protection for First Amendment values, but rather only lessened confidence in the judgments of lower courts and more entirely factbound appeals."

Bose at 519-20. (Emphasis added).

Accordingly, *Bose*'s independent review mandate, under the unique circumstances in which testimony relevant to falsity was the only evidence upon which the actual malice determination rested, is irrelevant to the

instant case in which the jury specifically found the statements and implication to be false and defamatory, and negligently and intentionally published. In fact, although unnecessary in a negligence case, the jury and appellate court found Defendants to have known the statements and implication to be false. Here, the jury, was instructed that a "statement is not false if it is substantially true," and was instructed that Defendants are negligent if, among other things, they act unreasonably in determining the truth or falsity of such statements. Accordingly, the *Bose* connection between falsity and fault is irrelevant, and Defendants' belief that *Bose* even alludes to a constitutional mandate that the Court of Appeal independently review the issue of substantial truth in such cases completely unfounded.

Defendants' reliance on *Connaughton v. Harte-Hanks Communications, Inc.*, 491 U.S. 657 (1989), is equally misplaced. Defendants, conveniently citing the Sixth Circuit decision to support their claim of conflict necessitating this Court's review, ignore this Supreme Court's analysis in reconciling any perceived ambiguity. Again, in a public figure malice context, the issue of falsity on review pertained to the jury's findings as to defendants' awareness of falsity as it related to actual malice:

> "Certain statements in the Court of Appeals' opinion, when read in isolation, appear to indicate that the court at times substituted the professional standards rule for the actual malice requirement and at other times inferred actual malice from the newspaper's motive in publishing [the] story. Nevertheless, when the opinion is read as a whole, it is clear that the conclusion concerning the newspaper's departure from accepted standards and the evidence of motive

> were merely supportive of the court's ultimate conclusion that the record 'demonstrated a reckless disregard as to the truth or falsity of [defendant's] allegations and thus provided clear and convincing proof of 'actual malice' as found by the jury.' 842 F. 2d, at 847. Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence [citations omitted], and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry. Thus, we are satisfied that the Court of Appeals judged the case by the correct substantive standard."

Harte-Hanks, 491 U.S. at 667-68. Finally, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), again involving a public figure malice case, this Court directly and expressly rejected Defendants' position here:

> "The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker's statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a 'rational interpretation' of an actual statement, drawing this standard from our decisions in *Time, Inc.* and *Bose* [citations omitted]. Application of our protection for rational interpretation in this context finds no support in general principles of defamation law or in our First Amendment jurisprudence. Neither *Time, Inc. v. Pape* nor *Bose Corp.* involved the fabrication of quotations, or any analogous claim, and because many of the

> quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory, we cannot accept the reasoning of the Court of Appeals on this point."

Harte-Hanks at 518. In the subject case, the Court of Appeal after the first trial was unable to review the substantial truth issue due to the insufficiency of the record. Def. App. 72a. The court did, however, identify the distinction between malice/fault driven reviews of substantial truth and pure falsity concerns. Def. App. 69a-72a. Contrary to Defendants' claim, the Court of Appeal made clear that "when the underlying facts as to the gist and sting of a defamatory charge are [disputed], . . . sufficiency of evidence analysis applied in case brought by private plaintiff against media defendant." [Citing *Lundell Mfg. Co. v. American Broadcasting Companies*, 98 F.3d 351, 358-60 (8th Cir. 1996). Def. App. 70a-71a. After the second trial, the Court of Appeal was not confronted with a jury determination of falsity in connection with an award of malice. Moreover, a careful review of the Second Opinion, consistent with *Lundell*, reveals that, as in *Harte-Hanks,* the Court of Appeal did engage in an independent review to determine and discern between undisputed and disputed facts. Def. App. 20a-26a.

B. The Cases Cited By Defendants Evidence An Absence Of Judicial Conflict, And Are Neither Relevant To The Analysis Of Substantial Truth In This Case Nor In Contravention Of This Court's Precedent.

The cases Defendants cite as supportive of independent appellate review of the falsity element are inapposite

to the instant matter and consistent with this Supreme Court's mandates on the issue. In *Velleiux v. NBC,* 206 F.3d 92 (1st Cir. 2000), the court reversed the jury's finding that thirteen (13) statements were false and defamatory and published with actual malice. *Id.* at 107. Applying Maine's common law expansion of constitutional principles, the court noted that:

> "Following *Bose*, *this court* . . . of appeal, has extended the independent review rule. . . . We have stated that where the trial court is called upon to resolve a number of mixed fact/law matters which implicate core First Amendment concerns, our review, at least on these matters, is plenary. . . . Independent review is subject to limitations, however. First, a court of appeals will not conduct a plenary review of the entire record. The *Bose* Court limited the scope of the independent review. [*citing, Bose, supra* at 514 n. 31.]
>
> Second, the reviewing court does not extend the independent review standard to all determinations. . . . [Citations omitted.] Purely factual determinations . . . remain best addressed by the factfinder, and are subject to the usual, more deferential standard of review."

Velleiux at 107. Finding each and every statement to be either true or unverifiable opinion, the court held that plaintiffs did not meet their burden of falsity necessary to establish fault. *Id.* at 114.

In *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (Mich. 1991), the Court of Appeal was reversed for reinstating a malice jury verdict for plaintiff after the *trial court* ruled that the statements comprising the implication at issue were not false. The Court of Appeal did so *without*

any review whatsoever, ruling that its prior denial of defendants' summary judgment motion was law of the case. *Id.* at 114-15. The focus of the trial was on the reporter's belief in the truth or falsity of the report. *Id.* at 119. The court's focus on falsity was based on the fact that "actual malice . . . necessarily involves a threshold determination of falsity, since proof of actual malice requires proof of both falsity and reckless disregard of falsity." *Id.* at 124-25.

Here, Defendants' substantial truth defense had nothing to do with the reporter's state of mind at the time of publication, and, in fact, was supported solely by evidence conjured up by defense counsel after the lawsuit had been filed. Finally, in *Deaver v. Hinel*, 391 N.W.2d 128 (Neb. 1986), a public official-malice case, plaintiff failed to meet the threshold burden of falsity by the requisite clear and convincing standard. *Id.* at 535, 540. In sum, the cases cited by Defendants do not engage in independent review of falsity unless critical to a determination of malice or state of mind.

There is no constitutional value in false statements of fact. However, States may not impose liability without fault. It is only in the analysis of the latter that the former gains the constitutional importance warranting independent review. Substantial truth is neither concerned with the breathing space to be afforded a free press nor the level of culpability at which that space gives way to individual reputation. It is merely a post-publication defense to stretch the truth; not a constitutional requirement.

II. That Plaintiff's Status As A Private Figure Is Soundly Supported In Fact And Law Over Which There Is No Conflict Between the Courts.

The Court of Appeal's decision below is not a departure from this Court's precedent nor do the cases reflect any disagreement in lower courts on the public figure issue. The cases cited by Defendants in their Petition neither evidence any conflict nor undermine the Court of Appeal's ruling in the instant case. Defendants do not cite a single case in which a passive investor in a business, holding no position as officer or director thereof, is deemed a limited purpose public figure by such marginal involvement. The cases cited by Defendants involve individuals who own and/or control high-profile companies. In sum, Plaintiff is not a limited purpose public figure.

The *only* fact Defendants raise in an attempt to analogize Plaintiff to a plaintiff that could be deemed to be a limited purpose public figure is based on a misrepresentation of Plaintiff's California Department of Savings and Loan ("CDSL") application. Contrary to Defendants' claim that Plaintiff, by his application, was to control Santa Barbara Savings and Loan, the true state of the facts is that through filing the Rebuttal of Rebuttable Presumption of Control, any control of Santa Barbara Savings and Loan by Plaintiff was specifically and absolutely negated. App. 3-10.

Although Defendants ignored this fact as a pretext for publishing the false and defamatory articles, the law is clear that Defendants cannot by their own conduct make Plaintiff a limited purpose public figure. A defamation defendant cannot create a defense by creating a controversy from the content of defamatory statements.

(*Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). A plaintiff does not become a public figure simply by responding to defamatory statements (*Time, Inc. v. Firestone*, 424 U.S. 448, 454-455, fn. 3 (1976)).

Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 252 (1984), reciting this Court's precedent made clear that:

> "[W]hen called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies. As reflected in the evolution of the public figure doctrine, from *Butts* through *Gertz*, *Firestone* and *Wolston*, such a determination is often a close question which can only be resolved by considering the totality of the circumstances which compromise each individual controversy."

Id. at 255 [citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Welch*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, *supra*, and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979)].

In *Gertz*, this Court ruled that Mr. Gertz was not a limited purpose public figure despite having, among other things, authored four books and "thousands" of articles in legal, historical and literary publications, having been the subject of forty articles in Chicago newspapers, and having had made many television and radio appearances. *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 558 (E.D. Mich. 1979), *quoting* from Robertson, *In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 1999, 222 (1976).

Moreover, merely being associated "with a matter that attracts public attention," absent any attempt to engage the attention of the public to influence the resolution of issues involved, was no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his name. *Wolston*, 443 U.S. at 169.

Although few generalizations can safely be promulgated, a review of *Gertz* and post-*Gertz* cases seems to warrant the comment of one scholar that:

> "A fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy."

L. Tribe, *American Constitutional Law*, 645 (1978). "[T]he detailed, fact-sensitive nature of the precedent indicates that particularized determinations of public figure status are the rule." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980).

To determine whether a controversy indeed existed and, if so, to define its contours, the trial judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy. Here, it is not.

Not everyone who participates in activities that affect the public becomes a public figure. *Waldbaum v. Fairchild Publ'n, Inc.*, 627 F.2d 1287, 1300, *cert. denied*, 449 U.S. 898 (1980). As numerously concluded by the trial court, the Appellate Court below, there was no public controversy at issue in the instant case and thus nothing for Plaintiff to voluntarily thrust himself into.

Moreover, the first trial and the appellate court in the instant case both concluded that, even, assuming *arguendo*, that a public controversy existed, Plaintiff did nothing to voluntarily seek to influence the resolution of any public issue involved. As previously determined, Plaintiff did nothing to shape the outcome of any specific public controversy, and thus remained a private figure for defamation purposes. Plaintiff did not have any role in any controversy sufficient to rise to the level required to make him a limited purpose public figure.

Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution. 418 U.S. at 345. They must have achieved a "special prominence" in the debate. *Id.* at 351. The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. *Rosanova v. Playboy Enter., Inc.*,

411 F. Supp. 440, 445 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

In *Kaufman v. Fidelity Federal Savings & Loan*, 140 Cal. App. 3d 913, 921 (1983), the court, citing *Gertz*, made clear that:

> "'[T]he instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event they invite attention and comment.' Plaintiff, by voluntarily injecting himself into [a] . . . dispute, must accept the necessary consequences of that involvement in public affairs."

Here, the Court of Appeal clearly and concisely ruled that "Ross did not thrust himself into any . . . public controversy."

In *Bruno & Stillman*, the First Circuit, consistent with the Court of Appeal below, found that, "the record reveals no public controversy antedating the publication of the [defamatory] articles." *Id.* at 591. In *Bruno & Stillman*, the plaintiff determined to be a private figure was the largest builder of fishing boats in New England. The articles reported on the safety of such boats and a number of owners' concerns therewith. In determining that no public controversy preceded the articles, the First Circuit found that:

> "[W]e know little or nothing of ongoing private controversies, not to mention public ones. This case is to be contrasted with one where 'persons actually were discussing some specific question . . . (and) a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.' *Waldbaum v. Fairchild Publ'n, Inc., supra*, 627 F.2d at 1297."

Publicity does not by itself elevate the parties to public figures, even if they could anticipate the publicity, unless they are using the court as a forum for espousing their views in other controversies. *Wolston, supra, at* 167-69; *Time, Inc. v. Firestone, supra*, at 455-57.

Defendants' citation to the District of Puerto Rico decision of *Girod v. El Dia, Inc.*, 668 F. Supp. 82 (1987), does not support their claim of conflict in the treatment of business figures. There, citing *Waldbaum, supra,* the court held that "being an influential businessman and tycoon does not by itself make plaintiff a public figure." *Girod*, 668 F. Supp. at 85. "However, when the entrepreneur exhibits an active and public ostentation of his role within the business and banking community, as well as the social and political spheres, he becomes, *under those circumstances*, a public figure." *Id.* The *Girod* court's decision turned on the fact that "the financial health of the trust company was a public issue, since the fate of the Girod Trust Company as a commercial banking institution in a small island community, involved and affected the property of many persons other than Alberic Girod." *Id.*

Here, the first trial court and the Appellate Court determined that no "matter of broad public interest" existed as to Plaintiff's "involvement with the bank and

his desire to purchase an additional interest in the bank." Def. App. 75a.

Girod is consistent with *Hoffman Co. v. E.I. Dupont de Nemours & Co.*, 202 Cal. App. 3d 390 (1988). In *Hoffman*, the plaintiff was a land developer who not only sought to build a housing project next to a chemical plant, but had also made political contributions to influence county officials who made the land use decisions. In holding plaintiff to be a limited purpose figure under the extreme circumstances unique to the case before it, the *Hoffman* court made clear that:

> "We do not mean to suggest that all speech relating to governmental affairs is automatically entitled to the highest level of constitutional protection, or to any protection. It is possible to conceive of speech concerning aspects of government that do not genuinely implicate any broad public interest nor materially enhance the self-governing ability of the public. However, as we have pointed out, the speech comprising the intentional tort alleged in this case does not relate to the conduct of low level civil servants regarding a matter of concern to few, but the exercise of power by elected officials on a matter of broad public interest. [Citations omitted.]"

Citing *Gertz*, the *Hoffman* court's secondary focus was on the fact appellant enjoyed "'access to the channels of effective communication' regarding the dispute and thus had a 'realistic opportunity to counteract false statements'." *Hoffman*, *supra*, at 405. Here, Defendants have proffered no evidence, disputed or otherwise, that Plaintiff had enjoyed "access to the channels of effective communication" so critical in *Gertz*.

The fact-sensitive analysis of the public controversy prong of the limited public figure analysis was set forth in *Hoffman* as being determined:

> "'[B]y the [expression's] content, form and context . . . revealed by the whole record'. [Citation omitted.] In the context in which it appeared, the speech with which we are here concerned pertained to two interrelated issues: most directly, the wisdom of the decision to permit construction of a housing development near a toxic chemical plant, and, indirectly, the manner in which political contributions from developers may have influenced the county officials who made the land use decision."

Hoffman, *supra*, at 406.

In the instant case, Defendants cannot point to a scintilla of evidence at the trial court level or the Court of Appeal below upon which this Supreme Court could question the limited public figure ruling herein. There was no "public controversy." Moreover, Plaintiff did not voluntarily thrust himself into any public issue whatsoever.

As set forth above, the Court of Appeal's conclusion on the limited public figure issue is soundly supported in this Court's precedent and consistent with federal and state courts.

CONCLUSION

For all of the reasons set forth above, Plaintiff respectfully submits that Defendants' Petition raises no issue for Supreme Court review.

Dated: April, 2004

Respectfully submitted,

LEONARD M. ROSS
1011 ½ North Beverly Drive
Beverly Hills, California 90210
(310) 278-8193
Respondent

Davis Wright Tremaine LLP **[LOGO]**

[Names And Addresses Omitted In Printing]

February 17, 2000

VIA FACSIMILE
Adam S. Bram, Esq.
Law Offices of Adam Scott Bram
1011½ North Beverly Drive
Beverly Hills, CA 90210

RE Ross v. Santa Barbara News Press

Dear Adam

As a follow-up to our discussion on February 7, 2000 concerning *in limine* motions plaintiff intends to pursue, we can represent the following on behalf of the defendants. First, defendants do not intend to call Barry Marlin, Al Ross or Lynn Stites as trial witnesses. I believe this renders four of twenty-two *in limine* motions unnecessary. In addition, defendants will not argue at trial that plaintiff is not a "private figure." This may make one other motion you were planning on filing unnecessary.

If you have any questions about these matters, please do not hesitate to call me or Gary Bostwick. We are still awaiting your response to the stipulations that were sent to you yesterday regarding potential agreement on three of defendants' *in limine* motions. We look forward to hearing from you. If you can not reach us at the office, please try my cell phone – [Phone Number Omitted].

Sincerely,

/s/ Karen Frederiksen
Karen N. Frederiksen
Davis Wright Tremaine LLP

KNF/ca

cc Anthony Michael Glassman, Esq.
Ernest Chen, Esq.

AGREEMENT

REBUTTAL OF REBUTTABLE DETERMINATION OF CONTROL UNDER PART 574

I. WHEREAS:

A. Leonard M. Ross and Merri Jean Ross, husband and wife (jointly referred to as "Ross") are the owners of 604,200 shares (the "Shares") of the $1.00 par value Common Stock (the "Stock") of Financial Corporation of Santa Barbara ("FCSB"), a savings and loan holding company, which owns 100% of Santa Barbara Savings and Loan Association, a California chartered savings and loan association, San Diego, California ("the Association"), which Shares represent 9.9 percent of a class of "voting stock" of FCSB, as defined under the Federal Home Loan Bank Board's ("Board") Acquisitions of Control Regulations ("Regulations"), 12 C.F.R. Part 574 ("Voting Stock");

B. FCSB and the Association are "insured institutions" within the meaning of the Regulations;

C. Ross may seek to acquire additional shares of Stock of FCSB ("Additional Shares"), such that Ross' ownership thereof will exceed 10 percent of a class of Voting Stock but will not exceed 25 percent of a class of Voting Stock of FCSB (the "Purchase");

D. Ross does not seek to acquire the Additional Shares for the purpose or effect of changing the control of FCSB or in connection with or as a participant in any transaction having such purpose or effect;

E. The Regulations, subject to certain exceptions, require a company or a person who intends to hold 10 percent or more but not in excess of 25 percent

of any class of Voting Stock of an insured institution or holding company thereof and that also would possess any of the control factors specified in the Regulations, to file and obtain approval of an application ("Application") under the Savings and Loan Holding Company Act ("Holding Company Act"), 12 U.S.C. Section 1730a, or file and obtain clearance of a notice ("Notice") under the Change in Savings and Loan Control Act of 1978 ("Control Act"), 12 U.S.C. Section 1730(q), prior to acquiring such amount of stock and a Control Factor unless the rebuttable determination of control has been rebutted;

F. Under the Regulations, Ross would be determined to be in control, subject to rebuttal, of FCSB upon the Purchase;

G. Ross has no intention to manage or control, directly or indirectly, FCSB;

H. Ross has filed on August 18, 1988, a written statement, as may be amended from time to time, seeking to rebut the presumption of control which is incorporated by reference herein, (this submission referred to as the "Rebuttal");

I. In order to rebut the rebuttable determination of control, Ross agrees to offer this Agreement as evidence that the acquisition of Additional Shares as proposed would not constitute an acquisition of control under the Regulations.

II. The FSLIC has determined, and hereby agrees, to act favorably on the Rebuttal, and in consideration of an FSLIC determination and agreement to act favorably on the Rebuttal, Ross and any other existing, resulting or successor of Ross agree with the FSLIC that:

A. Unless Ross shall have filed a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and either shall have obtained approval of the Application or clearance of the Notice in accordance with the Regulations, Ross will not, except as expressly permitted otherwise herein or pursuant to any amendment to this Rebuttal Agreement:

1. Seek or accept representation of more than one member of the board of directors of FCSB;

2. Have or seek to have any representative serve as the chairman of the board of directors, or chairman of an executive or similar committee of FCSB's board of directors or as president or chief executive officer of FCSB;

3. Engage in any intercompany transaction with FCSB or FCSB's affiliates;

4. Propose a director in opposition to nominees proposed by the management of FCSB for the board of directors of FCSB other than as permitted in paragraph #1 above;

5. Solicit proxies or participate in any solicitation of proxies with respect to any matter presented to the stockholders of FCSB other than in support of, or in opposition to a solicitation conducted on behalf of management of FCSB;

6. Do any of the following, except as necessary solely in connection with performance of duties as a member of FCSB's board of directors:

(a) Influence or attempt to influence in any respect the loan and credit decisions or policies of FCSB, the pricing of services, any personnel decisions, the location of any offices, branching, the hours of operation or similar activities of FCSB;

(b) Influence or attempt to influence the dividend policies and practices of FCSB or any decisions or policies of FCSB as to the offering or exchange of any securities;

(c) Seek to amend, or otherwise take action to change, the bylaws, articles of incorporation, or charter of FCSB;

(d) Exercise, or attempt to exercise, directly or indirectly, control or a controlling influence over the management, policies or business operations of FCSB; or

(e) Seek or accept access to any non-public information concerning FCSB.

B. Ross is not a party to any agreement with FCSB.

C. Ross shall not assist, aid or abet any of the FCSB's affiliates or associates that are not parties to this Agreement to act, or act in concert with any person or company, in a manner which is inconsistent with the terms hereof or which constitutes an attempt to evade the requirements of this Agreement.

D. Any amendment to this Agreement shall only be proposed in connection with an amended rebuttal filed by Ross with the FSLIC for its determination or a determination pursuant to delegated authority;

E. Prior to the acquisition of any shares of "Voting Stock" of FCSB as defined in the Regulations in excess of the Additional Shares, any required filings will be made by Ross under the Control Act or the Holding Company Act, as appropriate, and either approval of the acquisition under the Holding Company Act shall be obtained from the FSLIC or any Notice filed under the Control Act shall be cleared in accordance with the Regulations;

F. At any time during which 10 percent or more of any class of Voting Stock of FCSB is owned or controlled by Ross, no action which is inconsistent with the provisions of this Agreement shall be taken by Ross until Ross files and either obtains from the FSLIC a favorable determination with respect to either an amended rebuttal, approval of an Application under the Holding Company Act, or clearance of a Notice under the Control Act, in accordance with the Regulations;

G. Where any amended rebuttal filed by Ross is denied or disapproved, Ross shall take no action which is inconsistent with the terms of this Agreement, except after either (1) reducing the amount of shares of Voting Stock of FCSB owned or controlled by Ross to an amount under 10 percent of such class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations; or (2) filing an application under the Holding Company Act or, a Notice

under the Control Act, as appropriate and either obtaining approval of the Application or clearance of the Notice, in accordance with the Regulations;

H. Where an Application or Notice filed by Ross is disapproved, Ross shall take no action which is inconsistent with the terms of this Agreement, except after reducing the amount of shares of Voting Stock of FCSB owned or controlled by Ross to an amount under 10 percent of any class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

I. Should circumstances beyond Ross' control result in Ross being placed in a position to direct the management or policies of FCSB then Ross shall either (1) promptly file an Application under the Holding Company Act, or a Notice under the Control Act, as appropriate, and take no affirmative steps to enlarge that control pending either a final determination with respect to the Application or Notice, or (2) promptly reduce the amount of shares of FCSB Voting Stock owned or controlled by Ross to an amount under 10 percent of any class of Voting Stock or immediately cease any actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

J. By entering into this Agreement and by offering it for reliance in reaching a decision on the request to rebut the presumption of control under the Regulations, as long as 10 percent or more of any class of Voting Stock of FCSB is owned or controlled, directly or indirectly, by Ross, and Ross possesses any Control Factor as defined in the Regulations, Ross will submit to the jurisdiction of the Regulations, including, (1) the filing of an amended rebuttal or Application or Notice,

as appropriate, for any proposed action which is prohibited by this Agreement, and (2) the provisions relating to a penalty for any person who willfully violates the Control Act and the Regulations thereunder, and any regulation or order issued by the FSLIC, as applicable;

K. Any violation of this Agreement shall be deemed to be a violation of the Control Act and the Regulations, if applicable, and shall be subject to such remedies and procedures as are provided in the Control Act and the Regulations for a violation thereof, and in addition shall be subject to any such additional remedies and procedures as are provided under any other applicable statutes or regulations for a violation, willful or otherwise, of any agreement entered into with the FSLIC.

III. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one instrument representing the Agreement among the parties thereto. It shall not be necessary that any one counterpart be signed by all of the parties hereto as long as each of the parties has signed at least one counterpart.

IV. This Agreement shall be interpreted in a manner consistent with the provisions of the Rules and Regulations of the Board.

V. This Agreement shall terminate upon: (i) the approval by the Board of Ross' Application under the Holding Company Act or clearance by the Board of Ross' Notice under the Control Act to acquire FCSB and consummation of the transaction as described in such Application or Notice, or (ii) the disposition by Ross of a sufficient number of shares of FCSB or the taking of such other action so that thereafter Ross is

not in control and would not be determined to be in control of FCSB under the Control Act, the Holding Company Act or the Regulations of the Board under either in effect at that time.

VI. IN WITNESS THEREOF, the parties thereto have executed this Agreement by their duly authorized officer.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Date: _____ By: _____
Principal Supervisory Agent

L. M. Ross
Leonard M. Ross

Merri Jean Ross
Merri Jean Ross

Sworn before me and witness my hand and notarial seal this 16th day of August, 1988.

Helen E. Mays
Notary Public

My commission expires: Sept. 29, 1990

[SEAL]

(4)

No. 03-1338

Supreme Court, U.S.
FILED
MAY 4 - 2004
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SANTA BARBARA NEWS-PRESS, et al.,
Petitioners,

v.

LEONARD M. ROSS,
Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal, Second District

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

PETITIONERS' REPLY BRIEF 1

ARGUMENT 1

I. Respondent Does Not Provide Any Persuasive Reason To Forego Resolving Whether Appellate Courts Must Independently Review A Jury's Finding That An Allegedly Defamatory Statement Was Not Substantially True.....1

A. State And Federal Courts Are Divided On This Issue.....1

B. The California Court of Appeal's Ruling Contravenes This Court's Precedent. 3

C. This Case Is An Excellent Vehicle For Resolving This Issue. 3

II. Respondent Does Not Provide Any Persuasive Reason To Forego Resolving Whether Individuals Who Own Or Control Businesses In Pervasively Regulated Industries Are "Public Figures" For The Limited Purpose Of Media Coverage Of Their Business Dealings. 5

A. There Is Substantial Disagreement In The Lower Courts Concerning This Issue. 5

B. The Court Of Appeal's Ruling Contravenes This Court's Precedent. 6

C. This Case Is An Excellent Vehicle For Resolving This Issue. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 3

Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986).....2

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).....3, 6

Hathorn v. Lovorn, 457 U.S. 255 (1982) 7

Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir. 1988).....2

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 2, 4

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 3, 4

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 6

Rouch v. Enquirer & News, 487 N.W.2d 205 (Mich. 1992).....2

Trotter v. Jack Anderson Enters. Inc., 818 F.2d 431 (5th Cir. 1987) 5

United States v. Caldwell, 408 U.S. 662 (1972) 6

Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000).....2

Statutes and Regulations:

12 U.S.C. § 1817(j)(2)(A) 8

12 U.S.C. § 1817(j)(2)(B)(i).....8

12 U.S.C. § 1817(j)(2)(C) 8

12 U.S.C. § 1817(j)(2)(D) 8

12 C.F.R. § 574.4(b) 8

12 C.F.R. § 574.4(e) 8

Other authority:

Robert D. Sack, *Sack on Defamation* § 2.1 (3d ed. 2003).....1

PETITIONERS' REPLY BRIEF

Respondent does not contest the importance of the independent-review or public-figure issues presented here. Nor does he dispute the need for uniformity in these critical areas of First Amendment law. While Respondent does take issue with Petitioners' assertions that the California Court of Appeal's rulings conflict with this Court's and other courts' precedent – as well as with various alleged "misstatements and omissions of fact and law" in the Petition for Certiorari Br. in Opp. at 4 – Respondent's contentions do not withstand scrutiny. This Court should grant review to resolve the confusion over the constitutional issues presented and to reverse the California court's erroneous decision imposing a multi-million dollar judgment on a regional newspaper.

ARGUMENT

I. Respondent Does Not Provide Any Persuasive Reason To Forego Resolving Whether Appellate Courts Must Independently Review A Jury's Finding That An Allegedly Defamatory Statement Was Not Substantially True.

A. State And Federal Courts Are Divided On This Issue.

Respondent contends that the four cases Petitioners cite at Pet. for Cert. at 11-12 independently reviewing jury findings of falsity do not conflict with the California decision here because in those cases falsity was "critical to a determination of malice or state of mind." Br. in Opp. at 15. But this argument misunderstands libel law and misconstrues the holdings in those cases. The requirement that a libel plaintiff prove that the challenged statements were "false" is entirely distinct from the requirement that the plaintiff prove fault on the part of the reporter or publisher. *See, e.g.*, Robert D. Sack,

Sack on Defamation § 2.1, at 2-3 (3d ed. 2003). It is true that these two legal requirements are related; a plaintiff must prove both to prevail in a libel suit. But the elements operate independently. Merely proving that the press acted negligently or recklessly does not necessarily mean that that the report was false. *See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co.,* 838 F.2d 1287, 1294 (D.C. Cir. 1988) (separating falsity from fault).

Nor are the four cases applying independent review distinguishable from this one on the ground that those cases reviewed the record for "falsity," rather than an absence of "substantial truth." *See* Br. in Opp. at 15. There is no difference between those inquiries; under the common law and First Amendment, the test for falsity *is* whether the statement lacked "substantial truth." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 516 (1991). That is why the First Circuit in *Veilleux v. National Broadcasting Co.,* 206 F.3d 92 (1st Cir. 2000), noted that "[f]alsity overlooks minor inaccuracies and concentrates upon substantial truth," and independently reviewed the record for substantial truth. *Id.* at 108. The D.C. Circuit and the Michigan Supreme Court did exactly the same thing in the cases cited in the Petition. *See Liberty Lobby,* 838 F.2d at 1295 (independently determining that plaintiff did not demonstrate falsity because statements were "substantially true"); *Rouch v. Enquirer & News,* 487 N.W.2d 205, 214-15 (Mich. 1992) (same). The fact that the Nebraska Supreme Court did not explicitly mention the substantial-truth standard merely shows that it was not necessary to fine-tune the inquiry in that case; the court independently concluded that there were not any inaccuracies at all. *See Deaver v. Hinel,* 391 N.W.2d 128, 135 (Neb. 1986) (challenged statements were not false because they "state[d] the truth"). Accordingly, the holding below squarely conflicts with several decisions from federal appellate courts and state courts of last resort.

B. The California Court of Appeal's Ruling Contravenes This Court's Precedent.

While Respondent appears to acknowledge that the issue of falsity "gains the constitutional importance warranting independent review" in libel cases involving public figures (where plaintiffs must prove actual malice), Br. in Opp. at 15 he argues that such review is not constitutionally required in cases involving private figures (where mere negligence is needed to establish fault). *See id.* at 1, 7-13. Respondent's latter position is incorrect. The First Amendment requires independent review whenever a factual issue marks "the limits of [an] unprotected category of speech." *Bose Corp. v. Consumers Union,* 466 U.S. 485, 505 (1984); *see also* Pet. for Cert. at 13. And this Court squarely has held that falsity marks such a boundary regardless of the status of the plaintiff: "even a private figure plaintiff cannot recover damages [for libel] without also showing that the statements at issue are false." *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 768-69 (1986); *see also Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) (requiring falsity in private-figure case). The First Amendment, therefore, requires independent review of falsity in every libel case.

C. This Case Is An Excellent Vehicle For Resolving This Issue.

Neither of Respondent's attempts to cast this case as an unsuitable vehicle for resolving the independent-review question presented has merit.

First, Respondent is incorrect in suggesting (Br. in Opp. at 13) that the absence of actual malice here somehow deflates the importance of independently reviewing whether the statements at issue are false. Even assuming that Respondent was a private figure and thus did not need to prove actual

malice, falsity is just as much a part of a private-figure libel case as it is a part of a public-figure case. *See supra* part I.B.

Second, contrary to Respondent's suggestion (Br. in Opp. at 6 ¶ 5), the Court of Appeal found the evidence of substantial truth to be "ambiguous" and "conflicting" (App. 21a n.6) – thus showing that the standard of review dictated the outcome of the falsity issue on appeal. The Court of Appeal acknowledged, for example, that federal law enforcement agencies investigated Petitioner in the early 1970's for a potential violation of the Hobbes Act, as well as for alleged extortion, pistol-whipping, and kidnapping of his business partner. Pet. App. 22a. It also recognized, contrary to Respondent's suggestion (*see* Br. in Opp. at 5-6 ¶ 4), that the 1976 investor-fraud investigation began at the SEC and that the SEC "looked at" Petitioner in the early stages of that inquiry. *Id.* These facts and others demonstrate that the "gist" or the "sting" of Petitioners' allegedly defamatory statements – that federal authorities had investigated Respondent several times for alleged business improprieties – was justified. *See Masson,* 501 U.S. at 517 (quotation omitted).

Indeed, the Court of Appeal went so far as acknowledge at one point that the challenged statements here were "supported by . . . reasonable explanations of the evidence" because Petitioners had "conflicting information about whether [Respondent] was part of the 1976 investigation and to what extent." App. 41a. The court nevertheless also held that it "was reasonable for the jury to conclude" that Respondent was *not* investigated because he was not "the 'target' or the 'subject' of the inquiry." App. 24a-25a. The deference the Court of Appeal had to employ to uphold the jury's finding on this constitutional fact confirms that the finding could not survive independent review. A plaintiff cannot recover for libel when "the factfinding process [is] unable to resolve conclusively whether the speech is true or false." *Hepps,* 475

U.S. at 776-77. That is exactly what the Court of Appeal found to be the case here.

II. Respondent Does Not Provide Any Persuasive Reason To Forego Resolving Whether Individuals Who Own Or Control Businesses In Pervasively Regulated Industries Are "Public Figures" For The Limited Purpose Of Media Coverage Of Their Business Dealings.

A. There Is Substantial Disagreement In The Lower Courts Concerning This Issue.

Respondent does not dispute that public-figure law is in such disarray that "few generalizations can safely be promulgated." Br. in Opp. at 18. Nonetheless, Respondent attempts to take refuge from this chaotic state of affairs in the maxim that "our society is a blend of diverse individuals." *Id.* at 1. But surely this truism does not make it impossible to categorize and compare various courts' rulings. When one does that in the context of influential figures in strictly regulated industries, a clear First Amendment conflict emerges regarding the public-figure status of such persons. While courts such as the one here have held that a "prominent business person" seeking a substantial ownership share in a heavily regulated business is not a limited-purpose public figure unless he "thrust[s] himself" into the public limelight, App. 76a, other courts such as the Fifth Circuit have held that such a person "cannot erase his public-figure status by limiting comment and maintaining a low public profile." *Trotter v. Jack Anderson Enters. Inc.*, 818 F.2d 431, 436 (5th Cir. 1987); *see also* Pet. for Cert. at 19-21 (citing other conflicting cases). It is this conflict to which Petitioners – now joined by numerous leading media entities that investigate and report on business issues a regular basis – ask this Court to bring some semblance of order. *See* Media Entities Amicus Br. at 11-14. This Court can, and should, do so.

B. The Court Of Appeal's Ruling Contravenes This Court's Precedent.

Respondent's defense of the Court of Appeal's public figure ruling is ineffective. It goes without saying that none of the California cases Respondent cites are binding on this Court, and no decision of *this Court* ever has held that an influential business person must enter into a pre-existing public "debate[]" concerning a company-specific public controversy in order to be a limited-purpose public figure. Br. in Opp. at 6 ¶ 6, 18-19. Instead, this Court has held that it generally is sufficient if a person has voluntarily "assumed an influential role in ordering society." *Gertz,* 418 U.S. at 345 (quotation omitted). This broader protection is necessary because the First Amendment is designed not only to protect the press's ability to report on existing controversies but also to "gather information" and to "seek[] out" stories that affect the public. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 576 (1980); *see also United States v. Caldwell,* 408 U.S. 662, 722 (1972) (Douglas, J., dissenting) ("The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.").

In modern times more than ever before, individuals who own or control heavily regulated businesses exert great influence over society, thereby making it the media's duty to scrutinize such individuals. When a person voluntarily seeks what is presumed to be a controlling interest in a pervasively regulated and regionally prominent business, as Respondent did here, he assumes "the risk of closer public scrutiny than might otherwise be the case," *Gertz,* 418 U.S. 345, and renders himself a public figure for the purposes of his business dealings.

C. This Case Is An Excellent Vehicle For Resolving This Issue.

Contrary to Respondent's suggestions, there is not any procedural or factual impediment to considering the public figure question presented here.

First, Petitioners did not waive their right to raise the public figure issue here by declining in the second trial to challenge the Court of Appeal's prior private figure ruling. *See* Br. in Opp. at 2. Such a challenge would have been futile, for under the law-of-the-case doctrine, the trial court in the second trial was bound by the Court of Appeal's determination in the first appeal that Respondent was a private figure. *See* Pet. App. 14a-15a. Nor is it of any moment that in the second appeal, the Court of Appeal determined that the law of the case doctrine foreclosed reconsideration of it prior public figure ruling.

Petitioners challenge the Court of Appeal's determination in the first appeal that Respondent was a private figure. *See* Pet. App. 72a-77a. As the Petition for Certiorari noted, once all state-court proceedings are final, a party is entitled to challenge in this Court any adverse interlocutory ruling on a federal issue during those proceedings, regardless of whether it became the law of the case at some point. *Hathorn v. Lovorn,* 457 U.S. 255, 262 (1982); Pet. for Cert. at 19 n.2.[1] Accordingly, Petitioners have every right to challenge the Court of Appeal's initial resolution of the public figure issue at this time.

Second, Respondent's filing of "a Rebuttal of Rebuttable Presumption of Control" with federal regulators (Br. in Opp. at 4-5 ¶¶ 1 & 3, 16) does not diminish the strength of

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[1] Petitioners also note that they argued not only in their initial petition for review to the California Supreme Court but also in their second such petition that Respondent was a private figure.

Petitioner's argument that Respondent's potential influence over a pervasively regulated business rendered him a public figure for the limited purpose of reporting on his business affairs. As Respondent acknowledges, federal and state regulations presumed that his increase in ownership of the Santa Barbara Savings and Loan (SBSL) to 24.9% would give him control of that institution. Br. in Opp. App. 4; 12 C.F.R. § 574.4(b). Federal law deems such an ownership interest so important that it requires a federal banking agency to "conduct an investigation of the competence, experience, integrity, and financial ability" of the applicant and to report on whether it approves of the applicant's plans. 12 U.S.C. § 1817(j)(2)(B)(i) & (C). In the course of this investigation, the federal agency must seek the input of the affected state as well as the public. 12 U.S.C. § 1817(j)(2)(A) & (D).[2] And, most important, the federal agency has a duty to investigate such an applicant regardless of whether he seeks to rebut the presumption of control. *See* 12 C.F.R. § 574.4(e)(1)(ii) & (e)(3).

These regulations leave little doubt that Respondent was seeking to become a person of exceptional influence and significance in the savings and loan industry. Indeed, Petitioners' challenged newspaper articles about Respondent merely reported on the issues that federal law already

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[2] The latter subsection provides:

> Upon receiving notice of a proposed acquisition, the appropriate Federal banking agency shall, unless such agency determines that an emergency exists, within a reasonable period of time –
>
> (i) publish the name of the insured depository institution proposed to be acquired and the name of each person identified in such notice as the person by whom or for whom such acquisition is to be made; and
>
> (ii) solicit public comment on such proposed acquisition, particularly from persons in the geographic area where the bank proposed to be acquired is located, before final consideration of such notice by the agency . . . .

12 U.S.C. § 1817(j)(2)(D).

instructed the government to investigate and report on in a public manner. This is more than enough to show that Respondent voluntarily subjected himself to public scrutiny regarding his business affairs in the same way that other leading officials in other heavily regulated businesses do.

Finally, as Petitioners have noted, this case is an excellent vehicle for considering the public-figure issue here because the issue is outcome-determinative. Respondent loosely suggests a couple of times that Petitioners "intentionally" published defamatory statements they knew to be false, Br. in Opp. at 1, 11, but the Court of Appeal squarely held that Petitioners did not act with actual malice here. App. 38a-46a. Consequently, Respondent was entitled to recover damages only if he was a private figure. *See* Pet. for Cert. at 17.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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No. 03-1338

IN THE

Supreme Court of the United States

SANTA BARBARA NEWS-PRESS, ET AL.,

Petitioners,

—v.—

LEONARD M. ROSS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF MEDIA ENTITIES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed *amici curiae* hereby file their combined Motion for Leave to File and Brief Amici Curiae of Media Entities in Support of the Petition for a Writ of Certiorari. S. Ct. R. 37.2(b). Petitioners have consented to the filing of this amicus brief, and a letter of such consent is being filed concurrently herewith. Respondent has failed to return phone calls seeking consent; thus, consent has not been obtained from respondent.

Proposed *amici* are national media organizations involved in the gathering and reporting of news to the American public. The media entities who seek permission to submit this brief include publishers of newspapers from around the country ranging from *The Wall Street Journal*, *The Washington Post* and *USA Today* to the *San Diego Union-Tribune*, the *Providence Journal*, and the *Atlanta Journal-Constitution*; magazines of wide circulation, such as *Time*, *Newsweek*, *The New Yorker*, *Good Housekeeping*, *Town and Country*, and *Business-Week*; and national broadcast news networks, including ABC, Inc., CBS Broadcasting Inc., and National Broadcasting Company, Inc.; and Bloomberg News, which publishes news in a variety of media.

Proposed *amici* are vitally interested in ensuring that the substantive and procedural protections afforded by the First Amendment to the U.S. Constitution are vigorously and uniformly applied throughout the country. The present petition for certiorari highlights two critical areas of libel law as to which there are substantial inconsistencies in judicial treatment, inconsistencies well deserving of this Court's attention: (i) the failure of many lower appellate courts to engage in constitutionally mandated independent review regarding the issue of whether a plaintiff has shouldered his or her burden of

proving falsity; and (ii) the failure of many lower courts to treat individuals as limited purpose public figures who own, or seek to own, a controlling stake in a regulated industry such as the savings and loan industry in the instant case. Because there was a failure of these fundamental protections in this case, the *Santa Barbara News-Press* was forced to litigate this case for over a decade and now faces a multi-million-dollar libel judgment for the publication of two newspaper articles of undisputed public import to the local community. Proposed *amici* have a profound interest in this case because they, like petitioners, publish or broadcast news articles and editorials about prominent business leaders who purchase, or seek to purchase, controlling interests in regulated industries. Proposed *amici* depend upon independent appellate review and the public-figure doctrine in preparing news reports and editorials about such people without the fear of chilling libel suits.

For the foregoing reasons, proposed *amici* respectfully request this Court to grant the motion for leave to file their amicus brief in support of the petition, which is attached hereto.

Dated: New York, New York
April 22, 2004

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TABLE OF CONTENTS

	PAGE
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THIS COURT SHOULD DETERMINE THAT APPELLATE COURTS MUST ENGAGE IN AN INDEPENDENT REVIEW OF A FINDING OF FALSITY	5
A. The Lower Court's Decision Is at Odds with This Court's Precedent	5
B. Lower Courts Are Hopelessly Divided on the Issue of Whether an Independent Appellate Review of Falsity Is Constitutionally Required	8
II. THIS COURT SHOULD CLARIFY THAT A PERSON WHO OWNS OR SEEKS TO OWN A CONTROLLING INTEREST IN A REGULATED INDUSTRY IS A PUBLIC FIGURE FOR PURPOSES OF ARTICLES ABOUT THAT PERSON'S BUSINESS DEALINGS	11
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: PAGE

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 5-6

Fiske v. Kansas, 274 U.S. 380 (1927) 7

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 12, 14

Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) 6

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 5, 7

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, 515 U.S. 557 (1995) 7

Hutchinson v. Proxmire, 443 U.S. 111 (1979) ... 12, 17

Lundell Manufacturing Co. v. American Broadcasting Cos., 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) 4, 8-10

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 7

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5, 14

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)..... 7, 9, 11

Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) 11

PAGE

Silvester v. American Broadcasting Cos., 839 F.2d 1491 (11th Cir. 1988).....4, 12-14

Sisler v. Gannett Co., 516 A.2d 1083 (N.J. 1986).....4, 12-16

Trotter v. Jack Anderson Enterprises, Inc., 818 F.2d 431 (5th Cir. 1987) 15

Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000) 4, 8-10

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Constitutional Provisions:

U.S. Const. amend. I.....*passim*

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PAGE

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Rules:

Sup. Ct. R.

10..... 8

37.2(b) 1n

37.6..... 1n

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are national media organizations involved in the gathering and reporting of news to the American public.[1] The media entities that submit this brief include publishers of newspapers from around the country ranging from *The Wall Street Journal*, *The Washington Post* and *USA Today* to the *San Diego Union-Tribune*, the *Providence Journal*, and the *Atlanta Journal-Constitution*; magazines of wide circulation, such as *Time*, *Newsweek*, *The New Yorker*, *Good Housekeeping*, *Town and Country*, and *BusinessWeek*; and national broadcast news networks, including ABC, Inc., CBS Broadcasting Inc., and National Broadcasting Company, Inc.; and Bloomberg News, which publishes news in variety of media. A complete listing and description of *amici* is set forth in the appendix to this brief.

. *Amici* are vitally interested in ensuring that the substantive and procedural protections afforded by the First Amendment to the U.S. Constitution are vigorously and uniformly applied throughout the country. The present petition for certiorari highlights two critical areas of libel law as to which there are substantial inconsistencies in judicial treatment, inconsistencies well deserving of this Court's attention: (i) the failure of many lower appellate courts to engage in constitutionally mandated independent review regarding the issue of whether a plaintiff has shouldered his or her burden of proving falsity; and (ii) the failure of many lower courts to treat

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The petitioners have consented to the filing of this brief and their letter has been filed with the Clerk of Court; the respondent has not consented. Thus, *amici* submit this brief accompanied by their motion for leave to file same. Sup. Ct. R. 37.2(b).

individuals as limited purpose public figures who own, or seek to own, a controlling stake in a regulated industry such as the savings and loan industry in the instant case. Because there was a failure of these fundamental protections in this case, the *Santa Barbara News-Press* was forced to litigate this case for over a decade and now faces a multi-million-dollar libel judgment for the publication of two newspaper articles of undisputed public import to the local community. *Amici* have a profound interest in this case because they, like petitioners, publish or broadcast news articles and editorials about prominent business leaders who purchase, or seek to purchase, controlling interests in regulated industries. *Amici* depend upon independent appellate review and the public-figure doctrine in preparing news reports and editorials about such people without the fear of chilling libel suits.

INTRODUCTION

The *Santa Barbara News-Press*, in publishing its profile of businessman Leonard Ross, did what *amici* do countless times a week. It identified an important news story of public significance—the background of a prominent business leader who had filed an application with state and federal regulators to increase his ownership to a controlling percentage in a local troubled savings and loan institution—and it assigned a journalist to research and write a profile on the would-be purchaser. This was the late 1980s at the height of the savings and loan crisis that shook this country, a foreshadowing of recent corporate scandals involving companies like Enron that have become all to common. The journalist assigned to the story, Kathleen Sharp, researched her subject seriously and thoroughly. According to the lower court's opinion, she examined Mr. Ross's background for more than three

months; reviewed hundreds of pages of court records pertaining to many lawsuits in which Mr. Ross was involved, as well as an FBI report and grand jury transcripts into a criminal investigation of Mr. Ross; and interviewed approximately 100 people including Mr. Ross. Petn. at 6a.[2] After the publication of her first article, Mr. Ross withdrew his application to increase his ownership in the savings and loan institution. *Id.* at 7a. He then brought a libel action against the newspaper and its reporters for the original article as well as a follow-up article that reported the withdrawal of his application.

There is no dispute that the articles concerned matters of public importance. There is also no dispute that the articles at issue, which together consisted of 120 paragraphs and a sidebar chronology of events, were largely true. Mr. Ross challenged only three statements in the lengthy articles and a supposed implication from them—all related to whether it was true that Mr. Ross was "investigated" for the same investor frauds that sent his former business partner to prison.

This case highlights the importance of two safeguards that *amici* depend upon every day in ensuring that articles of public interest get written. The first is the doctrine of independent appellate review. Here, the lower appellate court refused to engage in such an independent review of the record to determine whether plaintiff had carried his burden of proving falsity. Had the court done so, it would likely have been obliged to conclude that plaintiff had not discharged this burden, in the face of testimony from an SEC lawyer that plaintiff was in fact "looked at" as part of the 1976 investigation into his former business partner. Petn. at 22a; *see also id.* at 6-7. The second protection is that afforded by the public fig-

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[2] Citations to the lower court's opinion are to the petition.

ure doctrine itself. Had Mr. Ross been held to be a limited purpose public figure, as *amici* believe he should have been with respect to an article about his prior business dealings bearing upon his application to gain a controlling interest in a savings and loan institution, the case would have been governed by the actual malice standard rather than mere negligence. Because the court found that there was no actual malice, the defamation claim would have been dismissed. This case, arising in an area of continuing disagreement among lower courts around the nation, thus highlights the dangers posed to First Amendment interests by the failure of courts to apply both independent appellate review and the public figure doctrine correctly and consistently.

SUMMARY OF ARGUMENT

This Court should squarely address the issues of whether the doctrine of independent appellate review applies to a finding of falsity and whether an individual who owns, or seeks to own, a controlling interest in a regulated industry is, at a minimum, a limited purpose public figure with respect to the person's prior business dealings. Both issues have led, as we set forth below, to stark inconsistency in lower court rulings. Both issues, as well, have led to inconsistent rulings in cases involving the *amici* themselves. *Compare Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) *with Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (disagreeing about requirement of independent appellate review of truth/falsity issue); *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) *with Sisler v. Gannett Co.*, 516 A.2d 1083 (N.J. 1986) (disagreeing about whether individuals with substantial interests in regulated industries should be deemed lim-

ited purpose public figures under the First Amendment). Based on their own experiences, as well as that reflected in the entirety of the case law, the *amici* urge this Court to grant the writ.

ARGUMENT

I. THIS COURT SHOULD DETERMINE THAT APPELLATE COURTS MUST ENGAGE IN AN INDEPENDENT REVIEW OF A FINDING OF FALSITY

A. The Lower Court's Decision Is at Odds with This Court's Precedent

The California Court of Appeal refused to review the jury's finding of falsity independently, and instead reviewed the jury's finding under a deferential standard. Petn. at 20a-21a. This ruling was erroneous. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court engaged in an independent review of the record and held that the facts there did not amount to the constitutionally required "actual malice" so as to support a libel judgment. In so ruling, this Court observed that when examining the line between constitutionally protected speech and unprotected speech, "[w]e must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 (internal quotation and citation omitted). Twenty years later, in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), this Court reaffirmed the principle of independent appellate review of "actual malice" findings. *Accord Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (independent appellate review of actual malice).

Independent appellate review of issues beyond actual malice has been undertaken by this Court in defamation cases. In *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), this Court reviewed a libel judgment that had been affirmed by the Maryland Court of Appeals involving comments made about a real estate developer's plans at a city council meeting regarding zoning issues. The debate at the meeting was heated and a local reporter, who covered the meeting, truthfully recounted in a newspaper article that some participants referred to the developer's plan as "blackmail." In reversing the libel judgment, this Court engaged in an independent review of the use of the word "blackmail" in the context of the meeting and the article. *Id.* at 13-14. This was not a review of actual malice; rather, it was of the take-away message of the average reader of the word "blackmail." This Court concluded that

> "[i]t is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was [the real estate developer's] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers or the newspaper articles reporting their words were charging [the real estate developer] with the commission of a criminal offense." *Id.* at 14.

Greenbelt demonstrates that this Court has not confined independent appellate review in the libel context to issues of actual malice.

Indeed, in *Bose* and in many later cases, the Court has made plain that independent appellate review is required in *all* cases raising First Amendment interests, not just libel law. *See Bose*, 466 U.S. at 504-08 (citing many examples, such as determinations of whether speech

amounts to unprotected "fighting words" or "incitement to riot" or "obscenity"); *Connaughton*, 491 U.S. at 685 n.33 (same); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 567 (1995) (whether parade was expressive activity entitled to First Amendment protection). In *Hurley*, this Court's most recent treatment of the issue, the Court (quoting from *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)) observed that the First Amendment-compelled requirement of independent appellate review "generally requires us to 'review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' " *Id.* at 567. Thus, in areas infused with a mixture of factual and legal questions, appellate courts routinely engage in independent appellate review to ensure that First Amendment-protected activity is fully protected.

This Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), makes clear that the element of falsity is a constitutional requirement. *Hepps* holds that the plaintiff in a libel case involving a matter of public concern bears the burden of proving that the statement at issue is false. Later, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), this Court embraced the doctrine of "substantial truth," making plain that a libel plaintiff may not prove falsity by showing minor inaccuracies if, had the literal truth been published, the same effect or "gist" would have resulted from the publication anyway. *Masson*, 501 U.S. at 517.

The question of truth vis-à-vis falsity is thus a dividing line between protected and unprotected speech. A true statement or, as set forth in *Masson*, a substantially true one, no matter how defamatory, cannot constitute libel. Yet, as *amici* can attest from their own experience,

questions of substantial truth are ones that are frequently fraught with imprecision, certainly as much as whether a libel defendant has published an article with actual knowledge of falsity, one of the two possible prongs of the actual malice determination.

B. Lower Courts Are Hopelessly Divided on the Issue of Whether an Independent Appellate Review of Falsity Is Constitutionally Required

The certiorari petition sets forth a split among federal appellate courts and state courts of last resort on the issue of whether appellate courts are required to engage in an independent review of the truth/falsity issue. Petn. at 8-12. The split is deep and well-developed. The division in authority will not benefit from additional views from lower courts; the split is ripe for this Court's guidance. *See* Sup. Ct. R. 10.

The gravity of the split can be demonstrated by comparing two cases that have been decided by federal appellate courts involving two of the *amici*: *Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) (independent review of truth/falsity required) and *Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996) (independent review of truth/falsity not required). *Veilleux* involved a challenge surrounding a broadcast that aired on "Dateline NBC" regarding the dangers to the public posed by tired long-distance truck drivers. The plaintiffs, including a truck driver who was profiled in the piece and his boss, brought a lawsuit claiming, among other things, that the broadcast defamed them. The broadcast generally painted an unflattering picture of plaintiffs, including statements that the truck driver had altered log books and had violated regulatory requirements. The plaintiffs challenged eighteen specific passages in the broadcast. The jury

held that thirteen of the passages were false, and awarded damages on the libel claims. The district court denied NBC's post-trial motions, ruling that the evidence must be viewed in the light most favorable to plaintiffs.

The First Circuit reversed the libel judgments. *Veilleux*, 206 F.3d at 105, 107-19. Key to the court's decision was the standard of review. On this, the appellate court was clear: "[d]eference to the jury is muted . . . when free speech is implicated." *Id.* at 106. Thus the Court explained that it would engage in independent review of the jury's determinations "that specifically involve the application of First Amendment law to specific facts." *Id.* at 107. Citing *Hepps*, the First Circuit stated that it was plaintiffs' burden to prove the falsity of each statement "and our duty, on appeal, to independently verify that this burden was met." *Id.* at 108.

The First Circuit thereupon engaged in a thorough review of all thirteen statements at issue. As to each, the same essential conclusion was reached: plaintiffs had failed to prove that the challenged statements were materially false. *Id.* at 105, 111, 113-19. The First Circuit would not have—indeed could not have—reached the same conclusion under a more deferential standard of reviewing the jury's findings.

In stark contrast, a far more deferential approach was adopted by the Eighth Circuit in *Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996). *Lundell* involved a challenge to a news story broadcast on "World News Tonight with Peter Jennings" as part of a continuing series entitled "Anger in America." The particular report focused on a garbage recycling machine, produced by plaintiff Lundell and purchased by taxpayers in rural Berrien County, Georgia. At issue was the use of the phrase "does not work" in the broadcast. Plaintiff Lundell filed a defamation claim

alleging that the "does not work" language falsely stated that the garbage recycling machine was inoperable. ABC agreed that the machine functioned properly, but pointed to the entire context of the report in arguing that the average viewer would understand the broadcast to mean that the recycling machine did not work as it was intended to—because it was too expensive to run. The jury found for plaintiff, and the district court granted ABC's post-trial motion, ruling that the news report was substantially true as a matter of law. *Id.* at 355.

The Eighth Circuit reversed and reinstated the jury's libel verdict. In its opinion, the court noted that the proper standard of appellate review had been hotly contested by the litigants. After reviewing this Court's precedents, the court concluded that "the First Amendment commands in a defamation case brought by a private plaintiff against a media defendant only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, these cases support a sufficiency of the evidence analysis." *Id.* at 359. This conclusion, of course, is in stark contrast to the First Circuit's decision in *Veilleux* that appellate courts must "independently verify" whether plaintiffs' have carried their burden on falsity. *Compare Veilleux*, 206 F.3d at 108. This Court should grant certiorari to bring harmony to this significant area of defamation law.

II. THIS COURT SHOULD CLARIFY THAT A PERSON WHO OWNS OR SEEKS TO OWN A CONTROLLING INTEREST IN A REGULATED INDUSTRY IS A PUBLIC FIGURE FOR PURPOSES OF ARTICLES ABOUT THAT PERSON'S BUSINESS DEALINGS

As this Court has recognized, the status of a libel plaintiff is one of the most important threshold questions in any libel case. *Hepps*, 475 U.S. at 775. In the underlying case, the classification of Mr. Ross as a private figure permitted the libel claim to go to the jury on the issue of negligence. If Mr. Ross had been classified as a public figure, as he should have, his defamation claims would have been dismissed because the trial court directed a verdict in petitioners' favor finding that no reasonable juror could find actual malice, a finding that was affirmed on appeal. Petn. at 34a. Like many cases involving the *amici*, the classification of the plaintiff as a public or a private figure was case-determinative.

As the certiorari petition demonstrates (Petn. at 17-21), lower courts throughout the country have reached inconsistent results regarding the status of a particular plaintiff in similar factual circumstances such as leadership in a regulated industry. As one often-quoted opinion put it, the process of determining who is and who isn't a public figure is akin to "trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). While it may be tempting to seek to explain the different outcomes on the public figure question on the basis of differing facts, a closer inspection reveals the inadequacy of any such explanation. Just as this Court has reviewed actual malice determinations to assure that *that* doctrine is given meaning through case-by-case adjudication, so too should this Court review

this case presenting important "public vs. private" figure distinctions.

Again, the conflict in the lower courts can be illustrated by contrasting two cases involving *amici* entities before this Court: *Sisler v. Gannett Co.*, 516 A.2d 1083 (N.J. 1986) (holding that for purposes of federal constitutional analysis, former bank president not a public figure for purposes of article about improper loans made by bank) and *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) (holding that individual plaintiff, who was the principal stockholder in companies involved in the jai alai industry, was a public figure for purposes of article about that industry). In *Sisler*, the local newspaper ran a three-part series concerning alleged improper loans made by the Franklin State Bank. One of the articles stated that plaintiff, the former bank founder and president, had received uncollateralized loans from the bank for other business purposes. The plaintiff brought a libel action. The trial court held that plaintiff was a private person and the jury returned a verdict for plaintiff, which was affirmed by the state appellate court.

The New Jersey Supreme Court, on the federal constitutional issue, affirmed that the plaintiff was a private figure. In so ruling, the court cited to the three leading cases from this Court on the subject: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). *Sisler*, 516 A.2d at 1090. The *Sisler* court narrowly, and we believe incorrectly, read these decisions and found that they supported the finding that the plaintiff was not a public figure. Citing *Gertz*, the court emphasized that the plaintiff had not "thrust [himself] to the forefront of particular public controversies in order to influence the

resolution of the issues involved." *Id.* Again, the court noted as persuasive that the plaintiff did not consciously seek attention on the particular public controversy, and in fact had shunned publicity generally since his retirement. *Id.*

In direct contrast is the Eleventh Circuit's decision in *Silvester*. There, ABC broadcast on its "20/20" program a report on allegations of corruption in the American jai alai industry. In particular, the program averted to allegations of illegal conspiracies regarding betting systems, as well as allegations of arson and fraud related to a gaming site. Like the banking industry at issue in *Sisler* and *Ross*, the jai alai industry is heavily regulated and infused with matters of concern to the public. The district court held that the individual plaintiff (and his corporations) was a public figure. Finding no clear and convincing evidence of actual malice, the court entered judgment for defendants.

The Eleventh Circuit affirmed the dismissal. In agreeing that the plaintiff was properly classified as a public figure, the court explained as follows:

> "Because the plaintiffs held positions of prominence in an industry with a very limited number of major figures, they were in a position to influence the resolution of the controversy over corruption in the jai alai industry. Plaintiffs initially thrust themselves into this position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants. By becoming important members of the regulated jai alai industry, they invited public scrutiny, discussions, and criticism."

Silvester, 839 F.2d at 1497. The reasoning of the Eleventh Circuit, which we believe to be the correct

approach, conflicts with that employed in *Sisler* and in the *Ross* decision below.

Amici respectfully urge the Court to grant the petition to harmonize the disagreement that exists in the lower courts in their approaches to the public figure/regulated industry intersection. *Amici*, like petitioners here, often report on business leaders such as Mr. Ross who either own or seek to own controlling interests in regulated industries such as banking, securities, and healthcare. Such industries are of obvious public concern, warranting particular scrutiny from the press and the public. News reports such as that reporting on Mr. Ross's past business dealings should be encouraged, especially when the same individual seeks to gain a controlling ownership interest in a regulated industry that could greatly affect the public. Such articles are clearly of the sort that require the "breathing space" articulated in *New York Times v. Sullivan*, 376 U.S. at 271-72.

Moreover, one who inserts himself into a position of prominence and control within a regulated industry thereby "voluntarily injects himself . . . into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. Such an individual necessarily invites scrutiny from the public and the press by the voluntary decision to play a prominent role in a public, regulated field. It should not be the case that individuals who have done so can escape limited purpose public figure status by simply stating that they did not want the scrutiny, or by pointing to the absence of a pre-existing "controversy." The "controversy" requirement has been read far too narrowly on the *Ross* and *Sisler* side of the split. Given the high degree of public interest and undeniable public importance of pervasively regulated industries, it should be enough to trigger public figure status that a person

has voluntarily assumed, or is seeking to assume, a position of control within such a business. The press should not be left to guess whether it will get the benefit of the public figure doctrine and the actual malice standard when reporting on such matters of obvious public interest.

By their nature, *amici* submit, pervasively regulated industries should be subject to the closest scrutiny, regardless of whether a specific controversy has surfaced. The savings and loan crisis of the late 1980s provided the background of the *Santa Barbara News-Press*'s investigative piece on Mr. Ross. Unfortunately, the nation has recently endured still more corporate scandals. *See, e.g.*, R. Smith and J. Emshwiller, *Running on Empty: Enron Faces Collapse as Credit, Stock Dive and Dynergy Bolts*, The Wall Street Journal, Nov. 29, 2001, at A1; D. Hilzenrath, *After Enron, New Doubts About Auditors*, The Washington Post, Dec. 5, 2001 at A1; S. Romero, *Turmoil at WorldCom: The Overview; WorldCom Facing Charges of Fraud; Inquiries Expand*, The New York Times, Jun. 27, 2002, at A1; J. Sandberg, D. Solomon, R. Blumstein, *Disconnected: Inside WorldCom's Unearthing of a Vast Accounting Scandal*, The Wall Street Journal, Jun. 27, 2002, at A1; J. Glater, *Freddie Mac Understated Its Earnings by $5 Billion*, The New York Times, Nov. 22, 2003, at C1. In the wake of such scandals, surely the press should be encouraged to play an active role in scrutinizing regulated industries and bringing to light the information that it learns. *See, e.g., Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 434 (5th Cir. 1987) ("[t]he purpose of investigative reporting is to uncover matters of public concern previously hidden from the public view"); *Sisler*, 516 A.2d at 1093 (noting that press is expected and should be encouraged to report on matters of public concern).

Amici believe that the proper reading of this Court's public figure jurisprudence was set forth cogently in the *Sisler* decision in its ruling, albeit only on state law grounds. After determining that plaintiff was not a public figure for federal constitutional purposes (a ruling *amici* believe was erroneous), the New Jersey Supreme Court reached the opposite conclusion on the basis of state law. As the court reasoned:

> "[I]n contradistinction from the federal view, we do not deem it unfair to favor free speech over the reputational interests of an individual who has voluntarily and knowingly engaged in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny. While such an individual has not sought publicity, by willingly and knowingly engaging in conduct that exposes him to the risk of attention, he has relinquished part of his reputation to the public eye. . . . In light of our stronger concern for speech on public matters, such an individual is not unfairly burdened with a higher standard for actionable defamation."

Sisler, 516 A.2d 1092-93 (internal citation omitted). The court noted that the plaintiff there, by serving as president and director of the bank and becoming "conversant with all the public and governmental interests that attend the banking industry" "voluntarily, and presumably knowingly, risked exposure on a subject-matter of legitimate public concern." *Id.* at 1093. The court went on to hold that the actual malice standard, therefore, should apply.

Amici believe that this rationale offered by the *Sisler* court is compelling, but that the very inconsistency in the case law that prompted the filing of the petition in

this case misled the New Jersey court to misapprehend the correct nature of federal law. It has been twenty-five years since the Court last addressed the public figure/private figure distinction. *Hutchinson, supra; Wolston, supra.* Since that time, a large body of law has developed in the lower courts that is utterly inconsistent. Since that time, regulated industries have taken on an even greater prominence in our society. The current case presents an appropriate vehicle for bringing order to at least one critical area of the public figure doctrine and establishing a workable rule: namely that individuals who own, or seek to own, a controlling interest in a regulated industry should be treated as limited purpose public figures as respects news reports about their business dealings.

CONCLUSION

For the reasons set forth above and in the petition, this Court should grant the petition for a writ of certiorari.

Dated: New York, New York
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APPENDIX

LISTING OF AMICI CURIAE

Advance Publications, Inc. is a communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. It also owns The Conde Nast Publications Inc., which publishes eighteen magazines with nationwide circulation, including *The New Yorker*, *Vanity Fair* and *Vogue*, and also owns Fairchild Publications, Inc., Parade Publications, and The Golf Digest Companies. In addition, it owns many Internet sites that are related to its print publications, as well as interests in cable systems serving over 2 million subscribers.

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. It owns, alone or through its subsidiaries, the ABC Television Network, the ABC Radio Network, ten television stations, and fifty-two radio stations.

Belo Corp. is a diverse media company that publishes leading newspapers around the country, including *The Providence Journal* and *The Dallas Morning News*, with a combined circulation of 900,000 daily and 1.2 million on Sunday; owns nineteen television stations reaching 13.8 percent of U.S. television households; and operates many news and information Web sites on the Internet.

Bloomberg News operates a 24-hour global news service that supplies business, financial and legal news to more than 200,000 subscribers world-wide though the Bloomberg Professional Service, an electronic real-time desktop delivery system. Bloomberg also operates as a wire service, serving more than 350 newspapers and magazines world-wide. Bloomberg also maintains eleven 24-hour cable television news channels around the

world, and WBBR, an all-business news radio station in New York City. Bloomberg also produces and distributes daily radio programming throughout the world through its 750 radio affiliates. Bloomberg also publishes two monthly magazines, and its Bloomberg Press division publishes more than 50 titles each year.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programmings, as well as news and public affairs magazine shows, such as 60 MINUTES and 48 HOURS. CBS also owns and operates television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and eight other daily newspapers in California, Illinois, and Ohio, and operates Copley News Service, an international news service.

Cox Enterprises Inc. publishes the *Atlanta Journal-Constitution* and owns Cox Newspapers, Inc., publisher of 16 other daily and 23 non-daily newspapers. It is also has a controlling interest in Cox Broadcasting, Inc., which owns 15 radio stations; Cox Radio, Inc., which owns or operates 78 radio stations; and Cox Communications, Inc., which provides broadband television programming, high speed internet access and telephony to over 6 million customers nationwide.

Dow Jones & Company, Inc. publishes *The Wall Street Journal*, a daily newspaper with a national circulation of over 2 million each business day, WSJ.com, a news website with approximately 700,000 paid subscribers, Dow Jones Newswires, a collection of real-time

electronic news services, *Barron's*, a weekly business and finance magazine, and, through its Ottaway Newspapers subsidiary, community newspapers.

Gannett Co., Inc. is an international news and information company that publishes 101 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including USA TODAY, which has a circulation of 2.2 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than 125 web sites in the United States and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation publishes newspapers, consumer magazines, and business publications, owns a leading features syndicate, has interests in several cable television networks, and produces movies and other programming for television.

The McGraw-Hill Companies, Inc. is a multimedia publishing and information company which publishes books and magazines, including *BusinessWeek*, and also operates four local television stations.

National Broadcasting Company, Inc. operates a national television network of more than 200 affiliates and several owned-and-operated stations, through which it produces and broadcasts local and national news programming, such as DATELINE NBC. It also owns two national cable news networks, MSNBC and CNBC.

Newsweek, Inc. is a subsidiary of The Washington Post Company, publishes the weekly news magazine *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur From-*

mer's Budget Travel Magazine, which is distributed nationally.

Time Inc. is the largest publisher of general interest consumer magazines in the world, publishing over 130 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Entertainment Weekly*.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 778,000 and a Sunday circulation of over 1.05 million. It is published by a subsidiary of The Washington Post Company.